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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

VS.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
(Volume I — Pages JA-1-JA-358)

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PETITION FOR CERTIORARI FILED APRIL 3, 1984

PETITION FOR CERTIORARI GRANTED MAY 29, 1984

BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants

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Relevant Docket Entries

2-13-80 Filed complaint and issued summons.

6-2-80 Filed Pltffs' Amended Complaint.

8-4-80 Filed ANSWER for defts.

10-23-80 Fld memo & order the second & third countd of the amended complaint dismissed OWEN J m/n.

1-25-82 NON JURY TRIAL begun 1-25-82; trial continued dated 1-26, 27,

28, Adj. to 2-23-81 at 2:00p.m. Trial continued & concluded on Decision by Judge D/R.....

2-17-83 Filed OPINION & ORDER 54286 Given the foregoing, I conclude that the Nation has infringed the pltffs' copyright without justification. The pltffs are awarded the $12,500 they were damaged by Time's non-performance, & such further amts. as may be found to be profits in an accounting before a Magistrate of this Court who shall hear & report thereon. Pltffs are awarded costs & disbursements. Attnys' fees are denied. In addition to the foregoing findings of fact & conclusions of law, the pltffs' heretofore-submitted detailed findings & conclusions are

herewith signed. So Ordered Owen, J. m/n

2-17-83 Filed MEMO ENDORSED, The fact that certain proposed findings herein are excised etc. as so indicated. So ordered Owen, J. m/n

2-18-83 Filed MEMORANDUM & ORDER, this case is referred to Mag. Sinclair to hear & report etc. So ordered Owen, J. copy sent to Mag.

3-1-83 Filed ORDER, after a trial before Owen, J. a finding of defts' liability for copyright infringement & an initial award of damages in the amt of $12,500. See opinion & Order of Owen, J. dated 2-16-83. A hearing on damages shall be held in this Courthouse on 3-16-83 at

9:30a.m. etc. Mag. Sinclair. m/n

3-16-83 Filed stip and order that pltff waive their right as determined by the Dist. court to recover profits of the defts in this action, further agreed that the accounting ordered by Owen, J. by order dated 2-17-83 & scheduled by Mag. Sinclair for 3-16-83 by order dated 3-2-83 is rendered moot. So ordered Owen, J.

4-5-83 Filed JUDGEMENT, #83,0511- Ordered that the pltffs. have judgt. in the sum of $12,500., as against the defts. with costs & disbursements to be taxed by the Clerk..Ordered that attny's fees be denied. - Clerk.....ent. 4-6-83. m/n

4-8-83 Filed pltffs' NOTICE OF APPEAL to the USCA for the Second Circuit from the pltff. Judgt. ent. on 4-5-83 insofar as it awards $12,500 in damages with costs & disbursements to be taxed by the clerk...m/n to Esq., Edward A. Miller, Esq. on 4-8-84..

4-22-83 Filed pltff. The Reader's Digest Assoc. Inc.'s NOTICE OF CROSS APPEAL to the USCA FOR THE Second Circuit from 1/ only so much of the final judgt. on 405083 2/ also the Order dated 4-21-80 & ent. 10-23-80 to the extent it dismissed the second & third counts of pltffs' amended complt. etc. m/ copies to Cahill, Gordon & Reindel; Andrew L. Deutsch Esq.; Am. Civil

Liberties Union; Leon Friedman,

Esq.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Relevant Docket Entries

9-14-83 Case Argued Before: Kaufman, Meskill, Pierce, C.JJ.

11-17-83 Judgement reversed in part, affirmed in part by published signed opinion, Kaufman, CJ

11-17-83 Dissenting signed opinion per Meskill, CJ

11-17-83 Judgement filed.

12-1-83 Appellees Harper and Row et al., petition for rehearing with a suggestion for rehearing in banc filed. (w/pfs)

1-4-84 Order denying appellees Harper and Row et al., petition for rehearing with a suggestion for rehearing in banc filed.

6-4-84 Certified copy of order from Supreme Court granted writ of certiorari to the United States

Court of Appeals for the Second Circuit filed. (S.C.# 83-7277 & 83-7327)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants

----------X

Amended Complaint

Plaintiffs by their respective attorneys, Edward A. Miller and Cowan, Liebowitz & Latman, P.C., for their complaint against defendants allege:

Jurisdiction and Parties

1. This action arises under the Copyright Act of 1976, 17 U.S.C. §1338(b). Venue arises under 28 U.S.C. §§1391(b) and 1400.

2. Plaintiff Harper & Row, Publishers, Inc. (sometimes hereafter "Harper & Row") is a New York corporation with its principal place of business at 10 East 53rd Street, New York, New York.

3. Plaintiff The Reader's Digest Association, Inc. (sometimes hereafter "Reader's Digest") is a Delaware corporation with its principal place of business in the Town of New Castle, New York.

4. Upon information and belief, defendant Nation Enterprises is a New York limited partnership with its principal place of business at 72 Fifth Avenue, New York, New York.

5. Upon information and belief, defendant Nation Associates, Inc. is a New York corporation with its primary place of business at 72 Fifth Avenue, New York, New York.

Facts

6. Plaintiff Harper & Row has been a leading publisher of books and journals in the United States and elsewhere in the world for more than 160 years. In 1979 it published under its various imprints in hardcover and paperback editions more than 1,000 books of every variety, including major works of fiction, history, biography and current affairs.

7. Plaintiff Reader's Digest is the publisher of the magazine Reader's Digest which has been published for over 57 years. It is now published and distributed worldwide in 15 languages in 163 countries. Plaintiff Reader's Digest is also the publisher of condensed books, general books, trade books, educational materials, phonograph records and audio tapes.

8. Upon information and belief, defendants are the publishers of the weekly magazine The Nation.

9. On or about February 28, 1977 plaintiffs Harper & Row and Reader's Digest entered into an agreement with former President Gerald R. Ford (the "Author-Publisher Agreement") to publish his memoirs, including his experiences as Vice President and President of the United States (the "Memoirs"). The Author-Publisher Agreement granted Harper & Row and Reader's Digest the exclusive rights to publish the Memoirs in book form in the United States and to license publication of the Memoirs (as well as adaptations and condensations thereof) in newspapers and periodicals before publication in book form.

10. It was agreed that the Memoirs would be 150,000 to 175,000 words in length and deal in part with the

resignation of President Nixon, his subsequent pardon and President Ford's reflections and recollections on this period of history and other matters. The parties also agreed that reasonable efforts would be made to preserve the contents of the Memoirs in confidence until first publication.

11. In accordance with the Author-Publisher Agreement President Ford completed preparation of the Memoirs and delivered the typewritten manuscript (the "Unpublished Manuscript") to plaintiffs in or about February 1979.

12. By agreement dated march 14, 1979 and pursuant to the Author-Publisher Agreement, plaintiffs sold to Time Inc. the exclusive license to publish, before any book publication, in the United States and Canada edition of Time magazine selections from chapters 1 and 3 of the Unpublished Manuscript (by then

entitled "A Time To Heal"). These chapters deal with President Ford's description and interpretation of the periods covering President Nixon's resignation and pardon. Time, Inc. was licensed to publish such selections only in its April 23, 1979 issue to be on sale April 16, 1979. Plaintiffs also agreed there would be no other authorized publication in the United States or Canada of any portion of the Unpublished Manuscript prior to April 23, 1979. It was further agreed that any publication of material from chapters 1 and 3 before the publication by Time magazine would require plaintiffs to renegotiate a $12,500 final payment due to plaintiffs on April 16, 1979.

13. By agreement dated march 14, 1979 and pursuant to the Author-Publisher Agreement, plaintiffs sold to Reader's Digest for $35,000 the exclusive license

to publish, before any book publication, in the English Language in the United States and Canada editions of its magazine Reader's' Digest selections from chapters 1 and 3 of the Unpublished Manuscript. Plaintiff Reader's Digest was licensed to publish such selections only in its May 1979 issue to be on sale April 24, 1979. Plaintiffs also agreed not to authorize any further publication in the United States and Canada of any portion of the then Unpublished Manuscript until May 28, 1979, except for the selections licensed for publication in the Time magazine edition to be on sale April 16, 1979 and the planned shipment to book stores on or after April 25, 1979 of the hardcover book edition of the previously Unpublished Manuscript entitled A Time To Heal (the "Book").

14. In or about April 1979, defendants, without the authorization of

either plaintiff, obtained possession of a copy of the Unpublished Manuscript and copies substantial portions thereof in preparing an article entitled "The Ford Memoirs, Behind The Pardon" (hereafter the "Infringing Article"), a copy of which is attached as Exhibit A. Defendants published the Infringing Article in the April 7, 1979 issue of The Nation.

15. Defendants' Infringing Article is copied from the Unpublished Manuscript and is substantially similar to significant portions thereof.

16. As a result of the April 7, 1979 publication of the Infringing Article, Time, Inc. cancelled its proposed publication of selections from chapters 1 and 3 of the Unpublished Manuscript and has refused to pay to plaintiffs the $12,500 payment due on April 16, 1979.

17. The Unpublished Manuscript is an original work of authorship for which copyright protection subsists under the Copyright Act.

18. Copyright registration for the Unpublished Manuscript was obtained in accordance with Section 411 of the Copyright Act from the United States Register of Copyright on August 24, 1979 (Certificate No TXu 26-776). Copies of this certificate of registration and of related supplementary registration (Certificate No CA TXu 42-204) are attached as Exhibit B.

19. Plaintiffs have duly recorded in the U.S. Copyright Office in compliance with Section 205(d) of the Copyright Act, the instruments of transfer under which they claim to be the owners of the exclusive rights granted to them in the Author-Publisher Agreement and granted to plaintiff Reader's Digest

in the above license agreement dated March 14, 1979 between the plaintiffs as licensor and plaintiff Reader's Digest as licensee.

20. By virtue of the Author-Publisher Agreement and the instrument of transfer with respect to the rights covered by that agreement and the instrument of transfer with respect to the rights covered by that agreement plaintiffs are the joint legal owners of the exclusive right, among others, under such copyright to license the publication of the Unpublished Manuscript in a newspaper or periodical prior to book publication. Plaintiffs are, therefore, entitled under Section 501(b) of the Copyright Act to institute this action for infringement of that right.

22. On or about June 6, 1979 plaintiffs, pursuant to the Author-Publisher Agreement, published the

Book under their joint imprint. Plaintiffs have duly complied with all of the requirements of the Copyright Act, including the statutory notice, registration, deposit and manufacturing provisions. Copies of the Book were manufactured in the United States by Tri Star Graphics and Fairfield Graphics at Minneapolis, Minnesota and Fairfield, Connecticut, respectively.

First Count

23. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 22.

24. At all relevant times, plaintiffs, as the owners of the exclusive publishing rights granted to them were the copyright owners of such rights under Sections 101 and 201(d) (2) of the Copyright Act.

25. As such copyright owners, plaintiffs at all relevant times have

possessed the exclusive rights under Section 106(1) (2) and (3) of the Copyright Act: (1) to reproduce the copyrighted Unpublished Manuscript in copies; (2) to prepare derivative works such as condensations and adaptations for pre-book publication serialization based on the Unpublished Manuscript and (3) to distribute copies of such works to the public by sale.

26. Defendants by publishing the Infringing Article, which was copied from and is substantially similar to significant portions of the Unpublished Manuscript, within the meaning of Section 501 of the Copyright Act have infringed such exclusive rights of plaintiffs as copyright owners with respect to the Unpublished Manuscript.

27. Defendants' actions have damaged plaintiffs by violating the exclusive rights granted to them under

the Copyright Act pursuant to Article I, Section 8, Clause 8 of the U.S. Constitution.

Second Count

28. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 22.

29. With full awareness that they were not legally authorized by plaintiffs to possession of the typescript or a copy of the typescript of the Unpublished Manuscript, or to access to its contents, defendants wrongfully obtained possession thereof, and converted the Unpublished Manuscript to their own use in violation of plaintiffs' rights by publishing the Infringing Article in their magazine The Nation. Defendants did so with full awareness of the above contractual arrangements with Time and Reader's Digest magazines and

the plaintiffs' publication schedule for the Memoirs.

30. Plaintiffs have been damaged by defendants' aforesaid conduct.

Third Count

31. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 22.

32. Upon information and belief, defendants at all relevant times were aware of the above contractual arrangements with Time and Reader's Digest magazines, the plaintiffs' publication schedule for the Memoirs and the unpublished state of the typescript manuscript upon which the Infringing Article was based.

33. Defendants in publishing the Infringing Article knowingly amd wrongfully interfered with the existing contractual rights and advantageous

relationships of the plaintiffs without reasonable justification or excuse, in particular by destroying the exclusive right of an author and his licensed publishers to exercise and enjoy the benefit of the pre-book publication serialization rights.

34. Defendants have damaged plaintiffs in their contractual and advantageous relationships.

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(a) With respect to the First Count, the Court should award to plaintiffs the actual damages caused by defendants' copyright infringement as well as any additional profits of the defendants attributable to such infringement;

(b) With respect to the Second and Third Counts, the Court should award to plaintiffs the actual damages caused

by such tortious conduct as well as any additional profits of the defendants attributable to such tortious conduct; and

(c) The Court should award to plaintiffs their costs, as well as reasonble attorney's fees and such other and further relief as may be just.

Dated: New York, New York
May 7, 1980

EDWARD A. MILLER, ESQ.
Attorney for Plaintiff Harper & Row, Publishers, Inc.
10 East 53rd Street
New York, New York 10022

COWAN, LIEBOWITZ & LATHAM, P.C.

By_____
A Member of the Firm
Attorneys for Plaintiff The Reader's Digest Association, Inc.
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New York, New York 10016

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants

----------X

Answer to Amended Complaint

Defendants Nation Enterprises and The Nation Associates, Inc. by their attorneys, Cahill Gordon & Reindel and Bruce J. Ennis, answer the Amended Complaint herein as follows:

1. Admit that plaintiffs allege that this action purportedly rises under the Copyright Act of 1976, 17 U.S.C. §101 et seg., 28 U.S.C. §1338(a) and-jurisdiction pendent thereto, admit that

plaintiffs assert claims of conversion and wrongful interference with contractual rights joined with a purportedly substantial and related claim under the Copyright Act pursuant to 28 U.S.C. §1338(b), admit that plaintiffs state that venue herein purpotedly arises under 28 U.S.C. §§1391(b) and 1400, and except as so admitted, deny the allegations contained in Paragraph One of the Amended Complaint.

2. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Two of the Amended Complaint.

3. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Three of the Amended Complaint.

4. Admit the allegations contained in Paragraph Four of the Amended Complaint.

5. Admit the allegations contained in Paragraph Five of the Amended Complaint.

6. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Six of the Amended Complaint.

7. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Seven of the Amended Complaint.

8. Deny the allegations contained in Paragraph Eight of the Amended Complaint, except admit that Nation Enterprises is the publisher of The Nation magazine.

9. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Nine of the Amended Complaint.

10. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Ten of the Amended Complaint.

11. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Eleven of the Amended Complaint.

12. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twelve of the Amended Complaint.

13. Deny knowledge and information sufficient to form a belief

as to the truth of the allegations contained in Paragraph Thirteen of the Amended Complaint.

14. Admit that, without the authorization of plaintiffs, Nation Enterprises published an article entitled "The Ford Memoirs, Behind the Pardon", in the April 7, 1979 issue of The Nation, refer to said article for the contents thereof, and, except as so admitted, deny the allegations contained in paragraph Fourteen of the Amended Complaint.

15. Deny the allegations contained in Paragraph Fifteen of the Amended Complaint.

16. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Sixteen of the Amended Complaint.

17. Deny knowledge and information sufficient to form a belief

as to the allegations contained in Paragraph Seventeen of the Amended Complaint.

18. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Eighteen of the Amended Complaint

19. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Nineteen of the Amended Complaint.

20. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty of the Amended Complaint.

21. Deny knowledge and information sufficient to form a belief as to the truth of the allegations

contained in Paragraph Twenty-one of the Amended Complaint.

22. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty-two of the Amended Complaint.

23. In answer to Paragraph Twenty-three of the Amended Complaint, defendants Nation Enterprises and the Nation Associates, Inc. repeat and reallege the admissions, denials, and averments contained in Paragraphs 1 through 22 hereof.

24. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty-four of the Amended Complaint.

25. Deny knowledge and information sufficient to form a belief as to the truth of the allegations

contained in Paragraph Twenty-five of the Amended Complaint.

26. Deny the allegations contained in Paragraph Twenty-six of the Amended Complaint.

27. Deny the allegations contained in Paragraph Twenty-seven of the Amended Complaint.

28. In answer to Paragraph Twenty-eight of the Amended Complaint, defendants Nation Enterprises and the Nation Associates, Inc. repeat and reallege the admissions, denials and averments contained in Paragraphs 1 through 22 hereof.

29. Deny the allegations contained in Paragraph twenty-nine of the Amended Complaint.

30. Deny the allegations contained in Paragraph Thirty of the Amended Complaint.

31. In answer to Paragraph Thirty-one of the Amended Complaint, defendants Nation Enterprises and The Nation Associates, Inc. repeat and reallege the admissions, denials and averments contained in Paragraphs 1 through 22 hereof.

32. Deny the allegations contained in Paragraph Thirty-two of the Amended Complaint.

33. Deny the allegations contained in Paragraph Thirty-three of the Amended Complaint.

34. Deny the allegations contained in Paragraph Thirty-four of the Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

35. The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

36. The claims alleged in the Amended Complaint are barred by reason of laches.

THIRD AFFIRMATIVE DEFENSE

37. Gerald R. Ford and Trevor Armbrister are indispensable parties to this action and have not been joined herein as party plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

38. The claims alleged in the Amended Complaint are barred by reason of the First Amendment to the Constitution.

FIFTH AFFIRMATIVE DEFENSE

39. The claims alleged in the First Count of the Amended Complaint are barred by the doctrine of fair use, both as judicially developed and as provided

by the Copyright Act of 1976, 17 U.S.C.§ 107.

SIXTH AFFIRMATIVE DEFENSE

40. The Second and Third Counts of the Amended Complaint are preempted by the Copyright Act of 1976, 17 U.S.C. §301.

SEVENTH AFFIRMATIVE DEFENSE

41. The Second and Third Counts of the Amended Complaint are preempted by reason of the Copyright and Supremacy Clauses of the Constitution, Article I, cl. 8, §7, Article VI, §2.

EIGHT AFFIRMATIVE DEFENSE

42. All portions of the "Unpublished Manuscript" referred to in the Amended Complaint and allegedly copied, quoted or paraphrased in the allegedly "Infringing Article" are not

within the subject matter of copyright either as defined by the Copyright Clause to the Constitution, or as defined in the Copyright Act of 1976, 17 U.S.C. §102(b).

NINTH AFFIRMATIVE DEFENSE

43. All portons of the "Unpublished Manuscript" allegedly copied, quoted or paraphrased in the allegedly "Infringing Article" are works of the United States Government within the meaning of the Copyright Act of 1976, 17 U.S.C. §105, and are consequently not entitled to copyright protection.

TENTH AFFIRMATION DEFENSE

44. All, or substantially all, of the portions of the "Unpublished Manuscript" allegedly copied, quoted, or paraphrased in the allegedly "Infringing Article" are the same as or substantially similar to documents and other material

in which Gerald R. Ford disclaimed all exclusive literary rights pursuant to a letter agreement dated December 13, 1976, by which Ford donated said documents and other material to the United States of America; copyright in said portions of the "Unpublished Manuscript" is therefore not vested in, assigned to, transferred to or owned by plaintiffs.

ELEVENTH AFFIRMATIVE DEFENSE

45. All, or substantially all, of the portions of the "Unpublished Manuscript" allegedly copied, quoted or paraphrased in the allegedly "Infringing Article" were in the public domain in the same or in substantially similar form before April 7, 1979.

TWELFTH AFFIRMATIVE DEFENSE

46. All, or substantially all, of the portions of the "Unpublished

Manuscript" allegedly copied, quoted, or paraphrased in the allegedly "Infringing Article" was work prepared, authored or created by Trevor Armbrister which as not "work made for hire" within the meaninf of the Copyright Act of 1976, 17 U.S.C. §§ 101, 201(b), and ownership of the copyright therein or all or some of the exclusive literacy rights comprised in the copyright therein were not transferred to plaintiffs.

THIRTEENTH AFFIRMATIVE DEFENSE

47. Plaintiffs' demand for reasonable attorneys' fees is barred by the Copyright Act of 1976, 17 U.S.C. § 412.

WHEREFORE, defendants Nation Enterprises and The Nation Associates, Inc., demand that judgement be entered in their favor:

(a) dismissing the Amended Complaint herein with prejudice;

(b) awarding them the costs of this action and reasonable attorneys' fees; and

(c) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 1, 1980

CAHILL GORDON & REINDELL

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_____
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Attorneys for Defendants
Nation Enterprises and
The Nation Associates, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Defendants

----------X

Judgement of United States
District Court for the Southern
District of New York, entered
April 5, 1983

The first count in the above entitled action having been brought on for trial before the Honorable Richard Owen, United States District Judge without a jury on January 25, 1982, and at the conclusion of the trial the Court having reserved its decision; and the Court thereafter on February 17, 1983, having handed down its Opinion and Order

awarding the plaintiffs $12,500.00., with costs and disbursements and denying attorney's fees; and the Court on February 18, 1983, having handed down its memorandum and order referring this case to Magistrate Kent Sinclair, Jr. to hear and report on such further amounts as may be found to be profits in accounting in addition to damages awarded to plaintiffs; and a stipulation and order having been filed on March 16, 1983, rendering the accounting ordered by Judge Owen moot, it is,

HARPER & ROW PUBLISHERS INC., et

ano -vs-

NATION ENTERPRISES, ET ANO -80

Civil 856 (RO)

ORDERED, ADJUDGED AND DECREED:

That the plaintiffs have judgement in the sum of $12,500.00., as against the defendants with costs and disbursements

to be taxed by the Clerk, and it is further,

ORDERED: That attorney's fees be and they are hereby denied.

DATED: NEW YORK, N.Y.
April 5, 1983

Raymond T. Burghaidt
Clerk

TRIAL TRANSCRIPT*

[Cross-Examination of Irwin Glikes] [173]

Q Was it your understanding that "A Time to Heal" would contain unique information with respect to the pardon of Nixon not before disclosed?

A We hoped that it would, though we had a pretty clear understanding that it would be the President's words and interpretations of those events that was likely to be unique because most of the book was in the public record.

Q You understood that from the beginning, did you?

A Well, there were conversations with the agents, endless conversations

---

* Pursuant to Supreme Court Rule 30.3, the original page numbers of the transcript have been inserted in brackets where appropriate.

with the agents and the President's representatives, and among those conversations it was clear, and if I remember correctly that language got into -- the results of those discussions got into the proposal that the book would be within -- the book would be the President's recollection of those events and would very much be within his definition of propriety of good taste in a President's memoirs. So we were told, and it was understood, there were not going to be any sensational revelations; it was primarily going to be the President's memoirs of his thoughts and feelings of the events he participated in.

Q Yesterday there was introduced in evidence [174] Plaintiffs' Exhibit 5, which was the letter you wrote to

Mr. Laster of the William Morris Agency on February 22, 1977.

* * *

[176]

Q You have in front of you Plaintiffs' Exhibit 5.

A I do.

Q This was a document written by you, is it not?

A Yes.

Q It was written to Mr. Laster of the William Morris Agency?

A Yes.

Q In it you ask for the right to publish President Ford's book, is that right?

A Yes.

Q Could you direct your attention to the last page of the document;

and particularly the first paragraph. Let me read it to you. It says "The authors, Gerald Ford and Trevor Armbrister." Let me pause for a moment there. At that time was Mr. Armbrister considered to be a co-author of the book?

A No.

Q "The authors, Gerald Ford and Trevor Armbrister, propose a manuscript of approximately 150,000 to 175,000 words, the major portion of which will describe in close [177] personal terms Mr. Ford's experiences when he became Vice President and then President of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about, one, Mr. Ford's relationship with former President Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; two, the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and, three, Mr. Ford's reflections on this period of history, and the morality and personalities involved."

Was that a fair statement of what you intended the book to be?

A Yes.

Q And is it what the book was, in your view?

A Yes.

Q You testified earlier briefly, and I didn't finish my questions about it, about the reminder given to President Ford not to breach his obligations to Harper & Row. Do you know if President Ford was told in words or substance that he ought not to appear on an NBC television program to discuss the pardon?

MR. ZISSU: Objection, unless the witness was part of those discussions. Unless he was a witness [178] or observed the communication that would be hearsay as to what he may have heard.

THE COURT: Do you want to lay a foundation?

MR. ABRAMS: It doesn't sound like the same side from a moment ago.

Q You were in charge, Mr. Glikes, of the publication of the book, is that right?

A Yes.

Q Of the publicity with respect to the book?

A In a supervisory way.

Q In a supervisory way of making sure that President Ford adhered to his contract with Harper & Row?

A Yes.

Q My question to you is whether you have any knowledge of President Ford being advised by Harper & Row not to appear on an NBC television program to

talk about the pardon of President Nixon.

MR. ZISSU: You see, your Honor, the basis for the objection is there is testimony, and there will be testimony, from the former President, as to how he was informed of things. As I understand it, it came directly through his literary agents or Dean Burch, who was his lawyer. Mr. Glikes, as far as I understand his testimony, was not even the person who communicated [179] directly with either of those two persons, and, therefore, it is a kind of a chain. I mean, if the question is whether he has some knowledge that there was a communication to either Mr. Burch or to the literary agents, that is one question, but to ask the question of what was

communicated to former President Ford takes a second link in that chain.

Q Let me ask the first link. What do you know as you sit here today of what was communicated to President Ford, and by whom?

A I know only a part of it. The part I directly know about is my expressing my concern to a member of the Harper & Row legal department about possible violations of our contract by such a TV program.

Q What were you concerned about?

A That this might happen before we published and thereby be in breach of our contract.

Q What kind of things were you concerned about that President Ford might disclose?

A I thought that he might on television tell some of the stories about how he felt and what he thought while the pardon was going on, that he might express his views about personalities, that he might, in a sense, convey the feeling -- [180]

Q What about facts? Let's put aside for the moment feelings.

A I actually had not finished my reply. [181]

Q I am sorry.

A That he might convey the tenor of what the book was to be, which was Gerald Ford's own account of those days. And we wanted the book to be that.

Q You were concerned, is it fair to say, that Mr. Ford would disclose "his experiences" as you used the term

in your letter to Mr. Laster with respect to the pardon?

A Yes.

Q And that Mr. Ford might disclose his reactions to the Watergate crisis?

A Yes.

Q And that Mr. Ford might disclose the circumstances and reasoning surrounding the pardon?

A Right.

* * *

[258]

FRED W. FRIENDLY, called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Professor Friendly, could you tell us what your education is, please.

A I grew up on 110th Street in New York, I attended PS 165, Hope Street High School in Providence, Cheshire Academy. Went to Nichols College, a small college in central Massachusetts, where I studied journalism and business administration.

Q What was your first job after you graduated?

A I went to work for radio station WEAN in Providence, Rhode Island. I was 21.

Q How long were you there?

A I was there until I was drafted in 1942.

Q What did you do at WEAN?

A I was at the beginning an announcer, then a reporter, then a producer, then a news executive.

Q What did you do during the war?

A I was at the beginning a trainee, then because of my communications background I became an instructor in the Signal Corps. When I went overseas I was given [259] the job in the China-Burma-India Theatre of instructing troops on why we fight. I was also a reporter for the CBI Roundup, which was the equivalent of the Stars and Stripes, the armed services newspaper. And I did certain radio broadcasts from places like Hiroshima and eventually in Europe when Morthausen and other prison camps were overrun. I was released from the Army, if that is the proper term, in 1945, just after the end of the war.

Q What was your first job after the war?

A Well, my first job was getting a job. It took two years. I decided not to go back to Providence, where I might have. I came to New York and I got a job first at NBC as a producer doing a program on -- a four-part program for radio on the birth of the nuclear age. And at the same time, I met Edward R. Murrow and he and I collaborated on a series of record albums called "I Can Hear It Now." Which eventually led to me being asked to come to CBS as a producer.

Q What was the subject of those record albums?

A Because of the advent of audiotape and the ability to edit audiotape, it was possible to take all the records that had ever been recorded

of Churchill, literally, Franklin Roosevelt, Duke of Windsor's abdication, and edit them. So Mr. Murrow and I collaborated on a [260] series of four or five albums which were sort of audio history of the period from -- first from 1933 to '45, then from '45 to '52; and then we did one from 1919 to 1933. "I Can Hear It Now", they were called. First in 78 because there was no LP then, then a long-playing record.

Q You said your next position was at CBS?

A The two jobs were concurrent. I produced that series called "The Quick and the Dead" at NBC and then I became a producer and then an executive producer at CBS doing "Hear It Now" and "See It Now." Again, with my senior colleague, Mr. Murrow.

Q What were those programs?

A They were weekly documentaries for ear and then for eye. I hesitate to use the word news magazine. They weren't that. But we did a weekly series, 39 weeks a year on the principal news events of the week and when we were at our best, of the principal news event of the week. I suppose what more people remember than any was a series of programs we did on what I guess we should call McCarthyism.

Q How long did you work on "See It Now"?

A From 19 -- "Hear It Now" from '50 to '51. "See It Now" from '51 till about '57. [261]

Q What was your role?

A I was executive producer and partner of my senior colleague.

Q What does an executive producer do?

A He is the equivalent of the editor-in-chief.

Q What was your next position after you finished in 1957 with "See It Now"?

A There was a fallow period where "See It Now" was off the air and we did a program called "Small World," which I could describe, if you want me to. It was a series of conversations with people all around the world. And then in 1959, "See It Now" by another name, was restored and called "CBS Reports," a title which I contributed. And that I was the first executive producer of "See It Now," of which "CBS Reports" began in '59 is still on the air.

I ceased being producer of it in 1964 because of a different assignment.

Q What was that assignment?

A I was asked to become president of CBS News in 1964, which meant what we call the hard news, nightly news and the documentaries like "CBS Reports." And I stayed in that position until 1966, when I departed, resigned.

[262]Q What were the circumstances of your departure?

A I assume you want a short version?

Q Yes, sir.

A I had taken very seriously our coverage of the Vietnam War. We were able to be the first network to cover the Fullbright Hearings on the causes of the Vietnam War and we went on the air,

frankly, for a half hour and stayed on all day for many days, and whenever the testimony of Secretary of State Dean Rusk, Robert McNamara, George Kennan and others. The other networks joined and at that point there was a clash of positions between top management and me over whether we should be on the air all day or do summaries at night. I thought we had to be on the air all day. Top management disagreed. Another executive was brought in between top management and me, which was not the terms of my agreement to become president of the News Division. And I resigned.

Q What did you do next?

A Well, I started to write a book, which I finished, but simultaneously I had on the same day almost the

next day, visits from the Ford Foundation, from its president, to be an advisor in communications, and from the Dean of the Graduate School of Journalism to become a professor at Columbia. The Edward R. Murrow [263] Professor. I accepted both jobs with the understanding from each of them that that would be satisfactory. I stayed in both those jobs until my retirement a year ago.

Q What was the nature of your position at the Ford Foundation?

A Well, the Ford Foundation, as you know, contributes anything from $100 million to $200 million a year to worthy philanthropic causes. Mr. Bundy, who was the President of the Ford Foundation, thought there was an opportunity

for us to do something in the birth of educational and then public television. It was my job to recommend to the Board decisions that amounted to grants totalling something between $275 and $300 million over the period of the 14 or 15 years I was there. There would be -- I don't mean this to be a self-serving remark, I mean it to be something about the Ford Foundation, there probably would be no such thing as public television without those grants from the Ford Foundation.

Q What did you teach at Columbia Graduate School of Journalism?

A I taught what I knew: journalism, which is all I know. At the beginning, broadcast journalism and the grammar of television and radio. I

found myself [264] more and more interested in the environment of broadcast journalism and began teaching courses on FCC regulations, which some law students took, and on the relationship of the media and the law; which I did not only at the journalism school but at the law school in collaboration with my colleague, Professor Benno Schmidt.

Q How many years have you taught at Columbia Graduate School of Journalism?

A 1966 to now. It may be 15 or 16 years. [265]

Q Have you taught courses which involve questions of journalistic ethics?

A Yes.

Q Which courses involve those matters?

A All the courses that I teach. I am going to teach a course on that tonight not only to journalism but law and medical students and others. I don't believe that the school of journalism should be a trade school. I don't believe we should be there to teach people how to run cameras and edit film, though we do teach some. I believe good teaching involves the placing of students or professionals -- placing them in positions where the agony of decision-making is so great that they can escape only by thinking. So I won't say I so much teach that as I create an atmosphere in which I ask questions and they answer what they would do under certain circumstances, and I do that not only to journalism

students but to law students and even occasionally even judges let me do it to them, and I also do it with young lawyers, medical students. But my principal field of interest is in educating journalists to the jobs they will be doing ten and twenty years after they are out of school.

Q Have you published any books?

A Yes. [266]

Q Could you identify them for us?

A Four major books. One "See It Now," which I did with Mr. Murrow, which was a sort of pictorial history of "See It Now." Then I wrote a book when I left CBS, which was called "Due To Circumstances Beyond Our Control." The first was published by Simon and

Schuster. The next three by Random House. "Due To Circumstances Beyond Our Control." "The Good Guys, the Bad Guys and the First Amendment," which was about the fairness doctrine and regulations having to do with broadcasting. And most recently a book published this year, "Minnesota Rag" which is a historical little picture version of the historic case Near v. Minnesota. I spent a lot of time in Minnesota writing that and explaining what the issues on prior restraint were in 1931 and what they are today.

Q Have you received any honors with respect to your journalistic work?

A Yes.

Q Would you tell us what they are?

A I hope you won't make me recite them all. I happen to think my profession gives itself too many honors. There is the Peabody Award given every year, several awards for broadcast journalism. Some of [267] the programs I produced or caused to be produced or was responsible for won ten awards. I also won the Lasker award several times which had to do with medical reporting. I won an award from NYU for my book "Good Guys, Bad Guys and the First Amendment." The University of Texas awarded me their Journalist of the Year Award, which is called a Merit Award. I think that's enough.

Q Have you won any Emmys?

A I bear the distinction of having taken CBS News out of the Emmy

competition. It didn't last for long. They were back the year after I left. There were programs that I worked on that received Emmys and it makes me uncomfortable to talk about them.

Q In the course of your journalistic work, Professor Friendly, did you come to make a variety of news judgments?

A That's what I did. Every day all day. Sometimes four, sometimes 30.

Q In the course of teaching have you come to explore with your students the nature of news judgments?

A Yes.

Q Are there some such judgments as to which you think reasonable journalists would disagree with each other?

[268]A Yes.

Q Many?

A Many.

Q Are there others as to which you think most or virtually all journalists would agree?

A Yes. Journalism and being an editor is a daily auction of the news hole, which is a term of art that really comes from newspapers more than broadcasting, which is after the advertising is in place, which is the first order of business how much of the news hole do you have left? In most newspapers it's roughly -- in the better newspapers its about 40 percent of the total space, 120, 130 columns. In newspapers I don't respect it gets lower. In broadcasting there is a news hole. So you conduct a daily auction. 7 o'clock at night you

have nothing in the daily news business. That news grows and you then have to make a determination: is it the story on Poland that is important or is it the story of the pardoning of the New York Times by the Governor of New Jersey on his last day in office, which is more important? So what editors do is make news judgments, editors and producers, every day, and you are judged on your ability to do that and serve the public and the [269] public interest, on your judgment.

Q Have you read The Nation article of April 7, 1979, titled "The Ford Memoirs Behind The Nixon Pardon"?

A I have read it several times.

Q Do you recall when you read it first?

A When it first came out.

Q Have you read President Ford's published book "A Time To Heal"?

A I read it when it came out and I read it in preparation for this testimony.

Q Have you read any other materials in preparation for your testimony today?

A I read the deposition of President Ford which was made available to me. I also read what was reputed to be the typed manuscript of his book to see if there was any difference between that and the published version. There often is. And I think I also read a letter from the President, or the executive director of the Reader's Digest on President Ford about this case.

Q Did you come to any judgment, Professor Friendly, as to the newsworthiness of the material published by The Nation in its article of April 7, 1979?

A I thought the article was very newsworthy. It had all the elements of a serious news story about [270] one of the most cataclysmic and serious events in peace time, other than assassinations, in my lifetime as a journalist. Watergate was a sobering experience for all. Everything about it will always be important to the American people.

Q Did you believe that all the material in the article published in The Nation was newsworthy?

A Yes. Some more than others.

Q Have you a judgment based upon

standards used within the journalistic profession as to the propriety of The Nation's conduct -- let me rephrase that. Please strike that. Professor Friendly, I would like you to assume for the moment that you received an unpublished manuscript of presidential memoirs in your capacity as a journalist. Assume further that it was unsolicited by you, unpaid for by you, but that you received it with knowledge that the individual that gave it to you was not authorized to give it to you. Do you have a view with respect to the material that you read from the manuscript of the Ford memoirs vis-a-vis as to the propriety of the conduct of The Nation publishing a news story such as it did?

MR. ZISSU: May I make this objection. [271] Propriety from what point of view?

MR. ABRAMS: From an ethical point of view as that is understood within the journalistic community.

A The first thing I would do would be to verify it.

THE COURT: Professor, what kind of experience have you had in terms of making ethical judgments of this kind, either first or second-hand?

THE WITNESS: If I take that question as I think I understand it, it's been generally in the broadcast area and it was a decision of what to put on television or on radio. Sometimes it was an event that happened in a far away place, sometimes it was an event that

happened right here. Sometimes it was a Government report such as the Warren Commission on the assassination of President Kennedy. But it was a constantly evolving process of determining what we would put on the air. Sometimes there were great pressures from people in high places not to put it on. I don't know if that answer is satisfactory or not.

THE COURT: I am afraid I have to say not really.

A How can I help you?

THE COURT: Well, the hypothetical as far as it goes is fine, but there is a lot more in it, [272] it seems to me, before it's really all encompassing enough to be something for you to chew upon, if I can put it that way, because you have got to assume that The Nation

came into possession of this article, this typescript, knowing that it was about to come out in book form, knowing that it was going to come out perhaps with some editing thereafter, knowing that it was going to be copyrighted and intended to be covered with that protection, and that the author of it was looking to personally profit from the ultimate publication of that article, and that by utilizing this would affect this purloined document of a copyrightable nature or intended to be copyrighted document. All of those factors it seems to me are ones that are appropriate for you to have as part of your fact pattern, and in order for you to -- to put it a little differently, for your views on this to be of maximum benefit

to the Court it would help me to know if you have ever run into situations where you have come into something which has the vast majority of those factors in one or more combinations.

THE WITNESS: I certainly, your Honor, can't give you a precise answer to that.

THE COURT: I would expect that.

[273]A In the course of my job I have read hundreds of manuscripts, I still see hundreds of manuscripts. People want comments, they want blurbs, what have you. I can remember a long time ago reading the galleys of Rachel Carson's historic book, "Silent Spring" to determine whether or not we would do a television program on that, and in making a decision on whether we should

report on some of her findings and whether to do a documentary on it.

THE COURT: Without her permission?

A With her permission. I cannot say to you, except for examples in Vietnam which are not precise to that, I ever found myself in that position. I did several broadcasts having to do with President Eisenhower. I did with my colleagues something having to do with President Truman's book, but always with his permission. If you ask me and I had the time to go back and look at my notes, I could probably find you times when I thought the news value of somebody's book, and the copyright, were two different elements. I will give you a childish little version of that. A primitive version, not childish. Each

of the networks has the rights to the Super Bowl. That means they have the right to televise the game. At the [274] end of the first quarter everybody else would have the right to say what the score was and what was happening. There is a limit to what the copyright can include, and I think the difference is between the news value, the newsworthiness of the event and the precise version that is being prepared by an author or a broadcaster. I cannot say to you that I ever had an instance precisely such as the one that is being adjudicated here, because I think it's almost sui generis.

THE COURT: You were being asked a question which I am sure you and Mr. Abrams probably discussed beforehand

as to the general nature of what he would be asking you, and obtaining from you what you might say in response to what he asked you.

A It was more of the former than the latter.

THE COURT: I wasn't quite sure, without laying some foundation, it was entirely appropriate to say if this manuscript, which we can assume for hypothetical purposes was purloined, had dropped into your lap weighted with all of these conditions, what would you have done. Is that a question you want to field?

A You are the judge.

THE COURT: No, no, you are the witness. I am here to listen. [275]

MR. ABRAMS: Your Honor, I would

like him to field the question, including all the additional elements Judge Owen has suggested to you.

A If I could be allowed this, in my classroon when students ask me a question I always say, "I ask the questions."

MR. ABRAMS: Not today.

A It says on me "professor," and it says on you "student." I think I am better at asking the question than answering. I will tell you what I would be prepared to do if the set of circumstances you hypothesize came to me and I will try to do it quickly. The first thing would be to evaluate it. Journalists are almost paranoid about being fooled and trapped. I think that's healthy. So the first thing I would do

is to make sure that the document I had in front of me was what it purported to be. I might even be so bold as to call the publisher, taking all the risks that I think that might involve. I wouldn't ask them for permission. But having verified -- I might not call if the person who gave it to me was someone I respected and trusted and someone who I knew was in a position to have that.

Having established the fact that this [276] was the document, I would have then read it very carefully, had people who were experts on that period of our history read it, compared it with the known record which I think is the big part of the job of a working journalist, and then I would have reported what I found to be, in that specific

example, some startling revelations. If I had found no startling revelations, if it had been a mood piece, if it had been about President Ford swimming the morning he took the oath of office in his pool so many laps, if it had been about his experiences at Yale, I would have thought that was something that had no great newsworthiness and was not something I should deal with. If I would have found in those documents some startling revelations that the American people had never been exposed to I would have felt it my obligation and my news organization's job to report those to the American people so that they would be in a position, which is a favorite line I have of my mentor Walter Lippman, who always said public opinion was like

a sea, constantly churning up and the journalist's job was to be like a light-house with his search light searching the sea looking for shoals and hidden rocks and silhouetting those, spot-lighting those, for the public to see and to know and to judge, but not do the judging for them. [277]

I would have thought that because of the prominence not only of the author of the book, a man I respect a great deal, but also of then General Alexander Haig, that the American people had a right to know all of those events that led to the pardon, and had to do with the transfer of power so that they could make judgments on those two men, both of whom, as I recall, were in 1979 poten-tial candidates for high office.

THE COURT: Would you have had any question in your mind of calling your copyright lawyer and saying to him, what are my risks in this area?

THE WITNESS: Of course I would. I don't know if I would have had a copy-right lawyer. I would have called my attorney, as I did, I suppose, four or five times a week, and I would say, "This is what we are going to do. Here's the story that we are going to write. What are the up-side risks and what are the down-side risks?" I wouldn't have asked him for permission. I think that was my job, if I were the senior executive. I think it's my job to find out from my attorney what risks, if any, there are, and every attorney that I ever worked with at CBS and other

places would have resisted advising me. He would have said, "Mr. Friendly, [278] it says on your door executive producer or president. It says on mine, counsellor at law. You have to decide what the risks are and what the obligations of printing it are. You have to make that decision."

THE COURT: I know, but he does more than that. Doesn't he recite to you what the copyright law risks are, if this is going to be under copyright you might expect a suit?

A He might tell me --

THE COURT: Et cetera.

A He might tell me that and he might say -- he might say if you were to reproduce chapters 1 and 3, which are the most relevant parts of the book for

this discussion as is, or virtually as is, you will be in jeopardy, and that's why I used the analogy of the football game. If you report what's newsworthy in this writing, just enough quotations to make it bona fide, to make it real, to make it convincing, we have a good chance of winning it. That is what I think he would say. I am not a lawyer and I don't want to pose as being a lawyer. I educated two lawyers. But I am not a lawyer, but I would listen and I would weight that copyright against the civil rights not of the newspaper or the magazine or the broadcaster but of our readers. It's a constant [279] business of weighing, in my profession, as I assume it is in yours. I would have to make that judgment. If today I

were somehow in a job like that again and I had the Stockman memoirs or the Lloyd Cutler memoirs written soon after being in the midst of a great event, and somebody told me what the copyright laws were, I would have to weigh that against the American people's need to know, as I was at the time of the Bay of Pigs, and made a bad mistake and did not report it as others did not, as I did in circumstances whether or not we had nuclear weapons in England. I am more worried about sins of omission than I am of commission. But in answer to your question, I would have to weigh that. I can't permit a lawyer, no matter how skilled, to make those decisions for me. He is not paid to do that. He is paid to make sure I know whatever the risks

are, and I am paid to make sure I know what our obligations to the public are.

[280]THE COURT: In this article, I gather your threshold criteria is the public's need to know?

THE WITNESS: That's right.

THE COURT: In your view, is the entirety of this article within that orbit?

THE WITNESS: I don't think, your Honor, that the entirety of any article ever written, unless it was three sentences long, could be that. Various editors edit differently. Had I edited that, I might have put more in about the Glomar, which was the ship Howard Hughes built to pick up the submarine parts off Hawaii, and I might have used less of something else. But I think that is a

fair job. I don't mean fair as to its quality, and I don't mean fair usage either, from the point of law. I think they did a pretty good job of it. I think the part that I found most relevant and most interesting for the American public to know was the part, and what I think most of that article reflected, on General Haig's conversation with President Ford that some people were talking about the pardon, but we weren't going to talk about that, and the subsequent phone call. I found that startling. I read that, I think, three or four times, and then I read it aloud to Mrs. Friendly, who is a school [281] teacher, because I couldn't quite believe what I was reading, because I think there is a way of saying, "We are

not going to talk about something" in a way that almost has a positive sound to it. And then when I read eventually that President Ford when asked about why it was he didn't say that before, he said nobody ever asked me. The only other thing I might have quarreled with The Nation --

MR. ZISSU: Your Honor, I think he is not referring to the article in that last.

MR. ABRAMS: If I could clarify for the record and for you, your Honor, I think the last reference of Professor Friendly was a line from President Ford in the course of my interrogation.

THE COURT: In his deposition?

MR. ABRAMS: Yes.

THE WITNESS: I'm sorry I didn't

say it better, as to when he said, "No one ever asked me."

I would have gone perhaps back to the testimony in the House to see if that question had been asked, because I also noticed in the Ford book, which I think was very good reading, that he objected to some of the questions being asked to him by a Congressperson. [282]

THE COURT: Let's stay with this article a little longer for the moment. Not that I don't want you to get into other things that I am sure Mr. Abrams will get you into, but if you go through this article, once you have covered what you regard as this so startling disclosure to you, you then get into his being excellent people, you get into whether he should have gone to see President

Nixon when he was apparently very, very ill, and a description of him at that time, apparently a common sense statement by a White House photographer that cut through apparently a lot of possible muddleheaded thinking and put some things in perspective that otherwise were not. Were all of those things newsworthy, in your opinion?

THE WITNESS: In preparing for today, which I looked forward to not only because I thought it was important --

THE COURT: Interesting, but were they newsworthy?

THE WITNESS: Take, for example, the one you mentioned, the boxed quote about "I went into President Nixon's hospital room."

THE COURT: He is stretched out flat on his [283] back, et cetera.

THE WITNESS: I read that, and I liked President Ford for having the compassion to describe it that way. I thought that gave me a better way to measure this fine, good man, and I thought it was important for The Nation to print that. I thought it showed balance, that everything in that article was not just about the pardon. Part of it enabled me to judge the whole man. I think one of the sins of journalism is sometimes we report only the pimples and warts.

THE COURT: But we are not dealing here with judging a man now, we are dealing with whether something is newsworthy enough to justify a breach of the copyright laws.

THE WITNESS: But, your Honor --

THE COURT: And you are saying that that part of this article is justified because it shows you something about balance as to the man. Do you mean that that balancing would justify a district judge in saying the copyright laws therefore are to be sidestepped as to this because it provides a balance? Is that what you are saying to me?

THE WITNESS: I am not saying -- I am not [284] directing you about anything.

THE COURT: As I understand from Mr. Abrams, so we have our foundation solidly between us, his first position is this article is newsworthy, and fair use on what he calls a thin copyright basis. His second point is if it is not

fair use, there are some First Amendment rights that supervene in some manner the copyright laws and prevent the Court from reaching them. We therefore start off with the premise there are copyright laws that have attached, and what I am trying to assess in discussing this with you is what aspects of this are of such a nature that the copyright laws are to be disregarded. You tell me they are to be disregarded as to the Haig conversations because of their startling nature. You then tell me that they are to be disregarded as to his feelings about going to see President Nixon because it shows a balance in the man. Is that what you are saying to me, that copyright laws should be disregarded for that purpose?

MR. ABRAMS: I am not sure if an objection is appropriate --

THE COURT: Sure.

MR. ABRAMS: With all respect --

THE COURT: We are having what I would call [285] a good dialogue here.

THE WITNESS: I sometimes get paid for seminars.

THE COURT: And I trust you are here.

THE WITNESS: I don't know what that means. Certainly, I don't know what you meant by that.

THE COURT: I assume the party that called you at least was going to take care of your expenses.

THE WITNESS: No sir, not true. I bought my own cab fare. There is nobody on earth who could pay me to say anything in a courtroom.

THE COURT: Very good.

MR. ABRAMS: If I could clarify it, part of the purpose of calling Professor Friendly -- and I encourage him to continue with the colloquy -- I did not call Professor Friendly to testify in his view when the copyright law should be overcome because of newsworthiness. I will argue that as I view it to you at some point. I called Professor Friendly for professional judgments as to the newsworthy quality of the material in the article, and not to make what I thought frankly would be a legal judgment.

THE COURT: We went a step beyond that because you asked him if you got this would you publish it.

MR. ABRAMS: Yes, I did. [286]

THE COURT: That then threw into this hopper all the logical things that flow from that, including my question to him, "Wouldn't you call your copyright lawyer," in which case the professor said, "Yes, I would, and he would advise me as to what my risks were," and therefore, I assumed that if the professor as an editor is going to publish this he is going to publish it in spite of risk, because I assumed that a lawyer is going to tell him this is copyrighted and, therefore, if you are going to publish it you have got a risk of copyright problem, and that takes us down to the fact that he is going to say, "I am going to publish it in spite of the copyright problem for some reason."

MR. ABRAMS: Then I haven't done my job well.

THE COURT: At any rate I think it was the original question which took us down this path.

MR. ABRAMS: I encourage the path. I simply want to say first of all I represent to the Court Mr. Navasky will testify he did call his lawyer. I did not ask Professor Friendly that because I didn't want his opinion on that.

THE COURT: We are talking about this in one of the classrooms at Columbia at this point.

MR. ABRAMS: Then I will encourage you to [287] continue.

THE COURT: So you go ahead.

THE WITNESS: By the way, when this is all over, I hope we can do that.

THE COURT: Very good.

THE WITNESS: The reason that I

mentioned that boxed quote about the compassion of President Ford for President Nixon was there is a temptation, when writing stories like this, to only tell about the pimples and warts, and good journalism requires that you balance it with that which is startling in another way and revealing in another way. If I said and did say that I found the revelations about the Haig-Ford conversation startling, I also found in a benign, affectionate way, compassionate way, the story in the hospital, and just to have told one without the other would have been unfair to President Ford. So I have an obligation to report not only the truth but the whole truth, as you would say in a courtroom. That I wouldn't want to just show those things

that might have made that conversation historic in a negative sort of way, and that I want to give a picture of what that book says by President Ford about President Ford, and I would find that relevant and important. [288]

If I were running a risk that this was not quite as newsworthy as the other, I guess in the contest that goes on in my conscience, my obligation to be fair is just as sanctified as my obligation to stay within what you have defined as the copyright laws. I don't know if I have made myself clear or not.

THE COURT: I am not saying there is necessarily an obligation to stay within it, but the task that may be imposed upon me is to determine whether there is a legitimate basis for stepping

without it, and in this you are called upon to give me assistance which I have no doubt you will do in that regard, and I am just probing that with you.

THE WITNESS: I am searching very deeply into my conscience. What I am trying to say is once I decide to go with that story, knowing all the facts, I have an obligation to be fair, and I think that obligation to be fair is almost more important than to be safe. But I wouldn't have expected that my lawyer would have given me a blank wall. I don't think, and I don't want to try to be a lawyer here, I don't think my lawyer would have said that is a terrible thing to do, as lawyers have said to me, if you do that you're going to get sued and we're going to lose. [289]

I don't believe that that is what my lawyer would have told me.

THE COURT: Your lawyer would doubtless have said this is under copyright or is to be placed under copyright and therefore has the protection of the United States copyright laws, would he not?

THE WITNESS: I think I am above my competence. I don't know he would say exactly that. But I think that is beyond my competence.

THE COURT: Let's assume that from my point of view that you called him and you said, "Look, Joe, this type script is in my hand and I have verified it, it's President Ford's, and he doesn't know I have it, and there are some things in here I would like to run."

Let's assume for argument's sake he says to you, "Phew, that's just a mouthful you have just handed me. Fred, there is the copyright laws of the United States of America you are going to have to keep in mind whatever you do." And you are going to say, "What do you mean by that?" And he is going to say to you, "Well, that means that there's certain protection the author has in these" -- he might even say, "I would want to look at [290] it to see if some of it is protected and some isn't." When he has said that to you you are then proceeding on the theory that there is some property right you would be choosing to disregard.

THE WITNESS: If I could respond --

THE COURT: Surely.

THE WITNESS: To a very probing and relevant question, first, I think my lawyer, if he was a good lawyer, and from the rates they charge I think he would be a good lawyer, would say, "My job" -- and this is what our lawyers used to say -- "My job is to help you get stuff on the air. That's my job. Not to be a censor. It's your job to make the decision." The dialogue we just had would have prompted me to say, "You know how," and I am not the editor of The Nation. I think I might have chosen to do another kind of story, which would have been -- a public servant, the highest public servant in the land, two years out of office, during the most historic, cataclysmic moment in peace time history, writing about events

that had been in his service as President, are so much in the public domain and the public has a need to know. I didn't say a right to know.

THE COURT: I said "need". [291]

THE WITNESS: I am always careful not to use that word, I know judges don't like it. So I relish the fact that you said it first. I could be wrong.

I would have then written a piece about that. I think there is a good book on the subject and five years from now you may all get to read it by somebody about what is the right of a chief executive of this country or any other country to be present at the creation, to be there when these great events are made, who is paid for the rest of his

life to be a former president, to be guarded, protected, libraries, offices, everything else -- what is his right suddenly to take information which the American people should have known -- I am speaking generically now -- and sell that back another way.

I know that's not what this case is about, but I think that's what my story would have been about. Mr. Navasky of The Nation chose to write a different way, but I think I might have done a story about that. Because whether it's Henry Kissinger or whether it's Harry Truman or whether it was Dwight Eisenhower or whether it's the President five years from now, I think the business of these exorbitant fees paid by broadcasters and publishers for people

writing about things that they should have told when they were in high office and when they testified [292] is something that I think is as serious at least as what brings us into this room together.

THE COURT: That is not quite responsive to what the lawyer would have said to you and what your response would have been.

THE WITNESS: I think the lawyer would have said, "If you think you can write this story so as not to invade the copyright" -- he would have given me the copyright laws to read and I would have read them as best I could, and I would have written this story without a lot of block quotes and without plagiarizing, I am not a plagiarist and I don't believe

The Nation is. I am not going to print the chapters as the Reader's Digest or a book digest would, but I would report using the analogy of the Super Bowl so the reader would know what happened. I could have satisfied my lawyer and my own sense of duty and law.

THE COURT: Now, you used the expression just a minute ago the lawyer would have said, if you can do this without invading the copyright law?

THE WITNESS: Right.

THE COURT: So that would be then a recognition on your part that you have got to have some journalistic justification for the invasion.

THE WITNESS: I don't think he would have told [293] me to invade it. I think he would have told me there is a

way to write a story like this, there is every day. Newspapers, I assume, I believe, I remember that newspapers and magazines wrote about The Nation article. There are ways to write a story using a minimum of exact block quotes, as I call them, to satisfy those copyright laws, but copyright laws of this country --

THE COURT: This is to satisfy the fair use doctrine.

THE WITNESS: That's right. But I don't want to put myself in the position of deciding fair usage. That is a job for the Court. I think it's possible for me to take any story out of any publication or broadcast and take that story and with skills I have, or people who work for me, who are often more

skilled than I am, to write that story in a way that wouldn't invade the letter of that law, or the spirit of it.

THE COURT: And one of the ways is to take a portion that is clearly newsworthy?

THE WITNESS: Right.

THE COURT: And the other is to write it in such a fashion that you are not doing a wholesale taking?

THE WITNESS: That's right.

THE COURT: All right. [294]

THE WITNESS: And I think -- it isn't black and white, there is a grey. One would have been to have taken chapters 1 and 3 and condensed them. One would have been to have written a line "President Ford says he did have a conversation about the pardon, but he said

later that had no relevance." I think that would have been irresponsible. I think in between those two extremes is what an editor does, a producer does, and I believe that is what The Nation did.

THE COURT: And the Nixon in the hospital is an appropriate tag-on because it's balance?

THE WITNESS: It helps to make balance. That is exactly right. It helps me to understand -- I mean, you could write that story in such a way that it would be unfair to President Ford. I think that's quite a fair piece. But that's my reason for pointing that out as something that I think has a place in the story.

THE COURT: The bottom line would

be that if this had come to your hands under the circumstances described you would have published, given your observations of the circumstances?

THE WITNESS: Not in a finite way because I don't want to say I would have done it just that way. [295] I am a broadcaster.

THE COURT: What would you have done differently than The Nation?

THE WITNESS: First, there is the limitation of the broadcast schedule. That piece which was a couple of thousand words, I guess, you would have to do a documentary to do on television. If I have done a documentary on it, it would have been about public officials and their memoirs. I think that probably would have been a four or five

minute piece, and I would have been limited in that. But I would have had much of what they had in there. I might have put the Glomar in and taken something about Kissinger out, but as a chief justice once said, editing is for editors.

I am not saying that as a point of law. I am just saying that there is no editor who wouldn't edit something differently. If I were to read something of James Reston in the paper today, and wanted to report what James Reston said about your Honor or President Carter, I think I could do that in a way that wouldn't have invaded the copyright law and still make sure that you, if you hadn't read the New York Times that day, if you were a reader of the Washington Post, would have known what Reston said.

[296]THE COURT: I want you to put this without unfairly being suggestive to you, but do I gather that if you had been in the publisher's shoes with this article you would not have gone quite as far as this article went?

THE WITNESS: I don't want to say that. All I'm trying to say to you, Judge Owen, is that I might have put some things in that they didn't put in, as in fact the editor of The Nation might have put some things in that I would not have put in.

THE COURT: Then the structuring of this text is consistent, in your view, with what you would have done, given the selection that was made, is that what you are saying to me?

THE WITNESS: That is what I am saying to you, sir.

THE COURT: All right.

THE WITNESS: I think the one exception -- and perhaps I will impress somebody with my credibility -- is that I wouldn't have put that block thing in there because I think somebody would have asked me that. I'm not a great believer in putting block quotes like that in articles like that. And I don't want you to think that I am in here to give The Nation an A plus on that article. I'm here to say they did a good job. [297]

THE COURT: Would this be a good time to take our midafternoon recess? We'll take a ten minute recess.

THE WITNESS: Does that mean I can go?

THE COURT: I doubt it.

(Laughter.)

(Recess.)

BY MR. ABRAMS:

Q Mr. Friendly, in the course of your colloquy with Judge Owen, you were asked certain questions about aspects of the article and certain judgments that you have reached about the article. I want to make sure that there is an additional factor included in your consideration and your testimony. Assuming that you decided, as you have testified that you have, that it was appropriate to publish an article such as this, even though you said it is not an A plus article in terms of grading --

A I grade very high.

Q Would it make a difference to you in your decision about whether to

publish if you had known that a news magazine was in the order of two weeks later scheduled to publish excerpts from the memoirs?

A I would have no way of knowing what they were [298] going to publish, and I am only in charge of one news organization. Not knowing that, I would say it is my job to get the information out as best I can, as reliably as I can, with whatever insight and organized curiosity I may have. I could not let that be a factor.

Q Would you try to get it out as fast as you could consistent with your publishing or broadcasting schedule?

A Depends what you mean by fast. I would not be reckless. My criterion would be: Is it a fair reflection of

the book, is it accurate and have I done as much digging with the known record, et cetera. You would not try to get it out in 24 hours, I would not try to beat the competition. Somebody told me that -- I would always assume that if I had it, maybe some other people had it. That wouldn't really enter into my mind, especially if I was publishing a magazine like The Nation. That would not be a factor. I train myself to get it right, to get it straight, and then publish it.

Q You testified that one thing that you would [299] do if presented with the memoirs would be to talk to experts and compare the article with the known record. Have you a view as to whether it is also appropriate

journalistic effort to write a news story with respect to the article itself without engaging in those actions which you testified to?

A Yes, that's one way to do it. That's really what this is.

Q Is it your view that it is one appropriate way to do it from a journalistic point of view?

A It is very appropriate. I wouldn't want to be misunderstood. The story that can't be edited hasn't been written. If suddenly the editor of this piece had to get out 300 words, he would get out 300 words. That's all I was trying to say, that various people editing a piece will put some things in and not others. I think it is just an incredible job. I found it eminently

readable, as I told you before. I read it twice.

Q In your colloquy with Judge Owen you spoke about the passage in which President Ford described President Nixon stretched out flat on his back in the hospital bed. I would like to direct your attention now to some of the other elements in the article which I had put before you [300] during the recess and ask you to give us your views as to the newsworthiness of those aspects. I will not take it in order, but in what I think is the order that you may have referred to it in your colloquy with Judge Owen. One of the sections at the bottom right at page 34 is with respect to David Kennerly, the White House photographer. Do you have a

view as to whether the information contained there is newsworthy?

A I think it is newsworthy. I think a 30-year-old photographer commenting on the Mayaguez at the highest council of the White House tells me something about the way business is being conducted in the oval office. Therefore, newsworthy.

Q Returning now to the passage on Secretary Kissinger in the preceding column, have you a view as to whether the material that is contained there, beginning towards the bottom of the column, on the left column and continuing on the right column there, is newsworthy material?

A Yes.

Q Why is that?

A Kissinger had been head of the national security office, had become Secretary of State, was obviously extremely powerful in the new administration, perhaps more than [301] in the Nixon administration, because President Nixon considered himself a foreign policy expert and will be remembered for the recognition of the People's Republic, and the relationship of Kissinger to that, and Kissinger saying to him, "It's my job to get along with you, not yours with me," is relevant.

Q What about the paragraph on John Connally, in the next column.

A At that point Connally too is in the sweepstakes for the Republican nomination in 1980, therefore, newsworthy.

Q That point, you mean when?

A When I read this.

THE COURT: '79.

THE WITNESS: '79. When I as an editor was preparing it, when my public was reading it or listening to it, it was when John Connally was a leading contender. As a matter of fact, before the primary he was perhaps the leading contender. The more I know about him from a source like this, the better. This is the President of the United States talking about him.

Q What about the section entitled "On the decision to run again"?

A Newsworthy because, as President Ford says, I believe, in another part of the book, and in the interrogatory [302] with you, if that is the right word, --

Q The deposition.

A The deposition, sorry, he was constantly being asked, are you going to run again? He couldn't go to a news conference, as I remember it, without being asked that question. There was, until the night that President-elect Reagan was nominated, a question as to whether President Ford might not be the vice presidential candidate, and I can remember that night, when many of us went to bed believing that he was going to be the vice presidential candidate under President Ford, and that was changed because they couldn't work out the details. So I call that relevant, I call that newsworthy. That event had not happened then, but the fact is that whether or not President Ford was going

-- former President Ford was going to be a candidate in 1980 presumably to run against a man who had just barely beaten him, was newsworthy.

Q What about the section on President Nixon's character, towards the bottom of the right column on page 364?

A I never can figure out the pagination in The Nation, so I am looking to see --

Q I'm sorry, it is the right column of the page that you are on right now. Entitled "On Nixon's Character."

[303]A It tells me almost more about President Ford than it does about President Nixon, but newsworthy. I am a little uncomfortable with this whole exchange because I'm saying that everything is newsworthy. If you ask me to

grade it, obviously some stuff is more newsworthy than others. And I don't want to be simplistic in my answer. This is hard ball I am playing with the Judge, and I don't want to sit here exclaiming newsworthy, newsworthy, newsworthy, and have him say to me, well, the way you put it, everything is a four star newsworthy. Some are only three and a half. Sorry about that.

(Laughter.)

Q Could you direct your attention to the first page of the article, right under the caption "The Ford Memoirs: Behind the Nixon Pardon," and in the second paragraph where -- let's do it line by line. The first line says, "Ford also writes that but for a misunderstanding he might have selected

Ronald Reagan as his 1976 running mate." Was that in your view newsworthy in 1979?

A I call that a four star, yes.

Q Why is that?

A Because the country had gone through a trauma and who the candidates were going to be in 1980 was very [304] important and who the candidates were in 1976 was also important. And it was relevant to, I suppose, whether the pardon would have taken place just as it had, had there been another man as vice president. We are going to be talking about that for the next hundred years. Our grandchildren will be talking about that. It is relevant news. It is relevant history. But it's very relevant at that time.

I think it deserves to be way up top in this. I might have written a little more of the dialogue between General Haig and President Ford than is in this article, but I certainly -- the fact that he seriously considered Ronald Reagan is relevant, important, newsworthy.

Q Have you a view as to whether the fact that President Ford wrote that Edward Bennett Williams was his choice of head of CIA as newsworthy?

A Well, I am going back now to my Judge Owen problem. I don't want to sit here and say four star, four star, four star. I will lose whatever credibility I have. I don't find that as interesting as some of the other stuff, but I find it has news value.

Everything has news value. That has a lot of news value. But, you know -- [305]

Q I will ask you just one more, to avoid --

A I am critical of everything I read. I could write you a very tough critique on this piece. That doesn't mean that I don't think it's newsworthy. I'm saying that I as an editor and a teacher of journalism, I am very critical of everything I read. You asked me if the part about Edward Bennett Williams, whom I know, is as newsworthy as the part about the pardon. It is newsworthy, but it is not as newsworthy as the other is.

Q Have you a judgment about whether the statement that President Ford's memoirs say that it was President

Nixon who first proposed Nelson Rockefeller for vice president and that Ford regretted his "cowardice" in allowing Governor Rockefeller to remove himself from contention is newsworthy?

A I found that stunning. If anybody other than President Ford said it, I'm not sure I would believe it, knowing the Rockefeller-Nixon relationship for the last 25 years. If it is there and it is said by President Ford in that book where he had no reason to say it if it wasn't so, I'd believe it and find it eminently newsworthy.

MR. ABRAMS: Thank you, Mr. Friendly.

I have no further questions.

THE COURT: Do you want to cross examine [306] now? We discussed this last week, you know.

MR. ZISSU: Yes, your Honor. I think that the plaintiffs would like to take some time to, you know, to cross examine and to consider a rebuttal witness with respect to Mr. Friendly. That may also be true of the others. And I suspect it will be true. So we would then go on to the next direct witness.

THE COURT: Professor, we will excuse you at this point.

* * *

[327]

RICHARD REEVES, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Mr. Reeves, what is your occupation?

A I am a writer, a journalist.

Q What was your education?

A I was educated as a mechanical engineer. I am a graduate of Stevens Institute of Technology.

Q What was your first position after graduation?

A Engineer for Ingersol Rand Corporation in Phillipsburg, New Jersey.

Q What was your next position?

[328]A I was the editor and general manager of a weekly newspaper in that town, the Phillipsburg Free Press. I founded the paper with another person.

Q What year was that, sir?

A 1961.

Q What was your next position?

A I was a correspondent for the Newark Evening News in Newark, New Jersey.

Q What did you cover for the Newark Evening News?

A I was originally the night assignment reporter in Northern New Jersey and then the Passaic County Bureau Chief and covered Passaic and part of Morris County of New Jersey, or was responsible for that coverage.

Q What was your next position?

A I became a reporter for the New York Herald Tribune.

Q What year was that?

A In 1965.

Q How long were you with the Tribune?

A A year.

Q What did you report about?

A By then -- I began as the New Jersey political correspondent and then

I became the New York political [329] correspondent, and for a time before the Trib folded I was in charge of an investigative unit at the Trib.

Q What is an investigative unit?

A Essentially people who went out and tried to develop their own stories or followed through on stories that were already in the news, and we did things on city health services, on air pollution, and did long series which the Trib did in those days.

Q What was your next position after leaving the Tribune?

A I was correspondent for the New York Times.

Q How long were you with the New York Times?

A A little over five years.

Q What did you do at the Times?

A I was initially a general assignment reporter, and then City Hall Bureau Chief, and then chief political correspondent.

Q When did you become chief political correspondent?

A In 1968.

Q Until when were you chief political correspondent?

A 1971.

Q What did you cover as chief political correspondent?

A I was in -- at that time the Times had a somewhat [330] different situation, but I was in charge of political coverage in the metropolitan area, which is New York, New Jersey, and Connecticut, and did national politics for

the Sunday edition, and the metropolitan job involved a staff of people.

Q What did you do after you left the Times in 1971?

A I became an editor at New York Magazine, and a columnist for Harper's Magazine.

Q What was the scope of the work that you did at New York Magazine?

A National affairs, politics and government, and also some local at New York Magazine. At Harper's it was all national.

Q What did you do at Harper's? What was your position?

A I had a monthly column. A monthly column on national politics.

Q How long did you work at the New York Magazine and Harper's?

A I was a couple of years at Harper's, and I was five -- about five years at New York Magazine.

Q What did you do next?

A I essentially began to work for myself. I [331] had also done some television at the same time and wrote books, and for a while I just did that work on books, did some television, and then I went to -- about a year after I left New York Magazine, I became national editor of Esquire. I was first a columnist on media for Esquire, and then became national editor, which was close to being a full time job. I was doing some consulting work for NBC, and that kind of thing.

Q What time frame are you talking about? When did you become national editor of Esquire?

A 19 -- the end of 1977, I think. From about the end of 1977 to toward the end of 1979. I don't remember the exact dates.

Q And when did you begin writing a media column?

A That was earlier. That was toward the end of 1976 -- the beginning, I can remember that, it was in February of 1977.

Q And how long did that continue?

A More than two years. Three years, maybe.

Q What did you do next?

A I went -- well, in the period I was with Esquire I began a syndicated column which appears twice a week in newspapers around the country, and then

began to write [332] for the New Yorker, and worked on books.

Q And do you have a syndicated column today?

A Yes.

Q Is it published anywhere in the New York area?

A It used to be in the Daily -- it was in the evening edition of the Daily News Tonight. I guess it's not in a city newspaper. It's in Westchester and through New Jersey.

Q How many newspapers are you syndicated in?

A 150.

Q Have you been associated with National Educational Television Network?

A Yes. I was -- originally I was a political commentator for them

since 1968, and have done a lot of work for them over the years including a documentary on courtrooms which ran on the PBS network, and actually I am currently writing a series for them on a book I am doing.

Q You mentioned you had written some books. Can you tell us what books you have written and what they are about?

A My first book was called "A Ford Not a Lincoln," about the presidency of Gerald Ford. The second one [333] was called "Old Faces of '79," which was a series of profiles of the political figures of our times. The next was called "Convention," a book on the Democratic convention in 1976. Then a book called "Jet Lag," which was a

book of essays basically about California and New York. And another one which will come out this year.

Q What is the book about that will be out this year?

A It's a retracing of the American travels of Alexis de Tocqueville, a modern "Democracy in America," or an attempt at that.

Q Have you done any teaching?

A I taught political science at Hunter and journalism at Columbia University Graduate School of Journalism.

Q Have you received any honors?

A Awards, yes. Awards are not hard to come by in journalism. The pay isn't good, but the awards are great.

Q Can you tell us some of the awards you received?

A I won the Emmy for best documentary film, the American Bar Association, I think it's Golden Gavel for court reporting, American Political Science Association, a Distinguished Reporting Award, Front Page [334] Award, and I got various and sundry awards.

Q In your capacity as a journalist, have you made a variety of news judgments?

A Yes. As an individual on my own stories and also while I was editor of a paper and was assistant state editor of the Newark News for a while and national editor of Esquire for part of that period and assigned and studied what would run, and that kind of thing.

Q Have you commented on news judgments in your media criticism?

A Yes. Both in Esquire, in the books, and a lot of my column actually is about media as opposed to politics.

Q Do journalists generally agree on a definition of what is newsworthy?

A Journalists argue a heck of a lot about what is newsworthy, but there is obviously a professional consensus as to what is news which you only have to look at the three nightly news programs to see how those decisions are made independently or the major newspapers in the country as to what they decide to play on page 1 or Time's cover or Newsweek's cover. Those are groups of professionals independently coming to the same conclusion, so that there are arguments but there is also a kind of professional [335] consensus.

Q Have you read The Nation article of April 7, 1979, entitled --

THE COURT: Can I trouble you for that consensus? What is the consensus? Structure it for me, if you will.

THE WITNESS: This is one person's view, obviously, but I think each day --

THE COURT: No, I thought there was a consensus.

THE WITNESS: No. I guess it's a post facto consensus. Each day organizations around the country, without consultation with each other, are making decisions about what will go on the news programs that day or the front pages of their newspapers or the covers of their magazines, and there is a high incidence of the same stories, a high incidence of correlation between those decisions.

That's what I meant by people coming to the same conclusion independently. But they don't confer.

THE COURT: The second fact that would establish is that there is a general approach to what is newsworthy that you all share?

THE WITNESS: Yes.

THE COURT: What is that approach?

[336]A I wish I knew. I think that the approach is probably made up of a set of informal rules that are compiled over the years. It's more a system that derives from practice than from any written guidelines. Whatever the President of the United States says is news. Any disaster that takes human life is news. Any public officials stealing money is news. Crime is news. I'm not

sure that anyplace those things are written.

THE COURT: I understand.

THE WITNESS: But that is what the profession is, I suppose.

THE COURT: Because, you see, Mr. Reeves, one of the purposes of your tender as a witness by Mr. Abrams, as I understood, was to assist the Court in a determination of what the industry felt was newsworthy, and, therefore, I come to you with the expectation that you are going to be able to enlighten me on what the industry calls newsworthy, and, therefore, I am approaching this maybe wrongly, but with the view that you possess, perhaps ill defined at the extremes, some definition of what you and the industry regard as newsworthy.

Obviously, when you get down to the edges of certain stories some people would disagree as to whether [337] something is newsworthy or is not newsworthy.

THE WITNESS: Right.

THE COURT: But that is what I thought you were going to tell me.

THE WITNESS: I will. I will go into much more detail about that if you would like me to.

THE COURT: I would.

THE WITNESS: I'm not sure how to approach the question. I mean, I feel personally qualified that I could walk into any news operation in the country. There are thousands of people who can do this. And I would, as we would say in the business, I would know a story if I

saw it. I know, I think by virtue of experience. I have an idea of what would get in a newspaper, what wouldn't, what would get in a magazine and what wouldn't, but I'm not sure how to respond to that in explaining.

THE COURT: What are the criteria you apply?

THE WITNESS: I think the criteria, broadly defined, would be what the public needs to know and what the public wants to know. And I think that those are two separate categories. And that the balance between them kind of determines the professional reputation of a journal or an electronic news program. The New York Times gives people more of what they [338] need to know. The New York Post may give them more of what

they want to know. But I think that's the broad, a broad working definition that many journalists would agree on.

Now, should I go into talking about what someone like me would think the public needs to know -- particularly what they need to know? [339]

THE COURT: Well, I gather you are going to do that at some point, focusing on The Nation article, which is the subject of this --

THE WITNESS: I think so, from conversation I have had.

THE COURT: Why don't you do that and if I have questions flowing from that, I will feel free to cut back in.

THE WITNESS: All right. I felt I was a little inarticulate.

Q You have read The Nation

article of April 7, entitled "The Ford Memoirs: Behind The Nixon Pardon"?

A Yes.

Q When did you first read it?

A My memory is that I read it -- I know I was traveling, because I was traveling on the book I talked about at that time. My memory is I read it when I got home from a trip, so I probably read it a week or so late. But I was aware of it because it was in the newspapers at the time that this article had come out and the information in it, and what not. And obviously Ford was a person I was more than casually interested in.

Q Have you re-read the article in preparation [340] for your testimony today?

A Yes.

Q Have you read any other materials in preparation for appearing here today?

A Not as much as you wanted me to. I looked a little bit at the complaint and glanced at part of the Ford book and the deposition.

Q The deposition of President Ford?

A Yes.

Q Did you look at any portions of the typed manuscript of "A Time To Heal"?

A Yes, but I really only glanced at it. I read a good deal of it at the time it came out and I glanced at the manuscript. I did not do all my homework.

Q That's nice to know. Directing your attention now to the article in The Nation on April 7, 1979, have you a judgment as to whether the material published there is newsworthy?

MR. ZISSU: I have an objection on this ground, your Honor: I thought the witness was going to testify on having read either President Ford's book or the manuscript and would testify as to what might or might not be newsworthy in that manuscript which was the manuscript that came into possession of The Nation. [341] It seems to me that it's the wrong approach to look at The Nation article.

MR. ABRAMS: It seems to me one appropriate approach, your Honor, for me to inquire of this witness as to the

article in question here, which brings about this lawsuit. I'm not suggesting and have not by calling Mr. Reeves, that that is necessarily the end of the case. But it seems to me that one of the relevant factors here under fair use is the purpose of the use, the nature of the use, and it seems to me that I should be entitled to make a record as to the use itself. The use itself is The Nation article, not the manuscript. Whatever is in the manuscript, it is relevant to show and therefore to be able to argue to you at the close of the case, that the material in The Nation article, which is the accused document, as it were, is newsworthy and to deal with the reasons why it is newsworthy. Then we will have legal arguments later on as to

the interrelationship of that to the manuscript. But that at least is part of a relevant issue.

THE COURT: The interrogatory, as I understand it, which you furnished plaintiffs, says that they are expected to testify that the treatment given newsworthy material in the manuscript was appropriate in the light [342] of long-established journalistic practice. It does seem to me, therefore, that you have to start off with what in the typescript manuscript was regarded as sufficiently newsworthy in this gentleman's opinion to have found its way into this article. I would sustain that objection. I think you have got to start with the typescript.

Q Mr. Reeves, in your review of

the manuscript and of the book, "A Time To Heal," directing your attention particularly to Chapters 1 and 3 of it, did you reach any conclusions as to the newsworthy character of any information contained therein?

A Yes.

Q Can you tell us, first, in general, what type of information you believed to be newsworthy?

A Obviously whatever Ford had to say about his actions when he was President of the United States, and Ford's judgment and interaction with people who were still public figures and still affected his very real and at that time current ambitions to be once again president.

MR. ZISSU: I am going to have an

objection. I don't think the foundation has been laid that the witness read the manuscript or even read the book, other than he stated he glanced through it. I'd object on that [343] ground.

THE COURT: Clear that up for us, will you please?

Q Have you read the book, "A Time To Heal"?

A Yes. I have not read every word of that book, though. I mean, I read the book at the time it came out. I wrote about the book at the time it came out.

THE COURT: In what form did you write about the book?

THE WITNESS: In terms of inconsistencies of -- I had written a book about Gerald Ford, so that some of

the versions in his book about events that had happened were different to a degree from things that he had said at the time they were happening. I mean, those had both historical and news value at that time, at the time the book came out. The book itself coming out was a news event.

Q Why is that, sir?

A Well, this was his -- we are talking about a man who was, you know, part of the American dialogue, an important part. And everything he said, he has said after his presidency, as he said during his presidency, is news. Gerald Ford is one of that group, a part of [344] any definition of news would be that there are a group of people in this country of several hundred who almost

everything they do is news, and of that group there are probably a couple of dozen people who are potential presidents of the United States. And everything they say and do is certainly considered news by the news business.

Whatever Edward Kennedy does is news, because Edward Kennedy could be President of the United States. Whatever Nelson Rockefeller did was news for that reason. Whatever Gerald Ford did and does is news. Gerald Ford, after all, tried to run for president after this book was written. And there were many people who knew he already was considering that at the time the book was written. And he was already meeting with people about running for president again. So that his view of certain

things, his view in the book of Ronald Reagan, of Alexander Haig, of Henry Kissinger -- and Haig also then was a candidate for president, informally. These were important political events at the time the book came out. Significant political events that fall, I would say, fall well within the definition of news. I mean, they are very close to the center of news in this country, because that is the information [345] people need about the people who would lead the democracy.

Q Is there some information which is more central, in your view, to what you have characterized as the public's need to know than other information, even though they are both about public officials?

A I didn't understand that.

Q You used the word in your last answer, that what Gerald Ford thought of Alexander Haig, for example, was close to the center of the definition of what's news because it related to what the public really needed to know.

A Well, what the public, particularly the public identified with the Republican Party, needed to know at the time we are talking about -- at the time that book came out, Alexander Haig was ending his stint as Commander of NATO. He was giving interviews, sometimes with his name, sometimes on background, to the most prominent columnists in the country, talking about his own presidential ambitions and the fact that he planned to resign to come back to the

United States to begin a campaign, James Reston of The New York Times, being the most prominent of the people getting those interviews. At the same time, number of Republicans were calling on Gerald Ford during that period, which I again wrote [346] about, saying that he should run again in 1980. He was encouraging them. He was privately offering the opinion at that time that Ronald Reagan was unqualified to be President of the United States. These people had come to him saying we must stop Reagan from being president, this man can't do it.

Ford later said these things publicly. So that when -- Gerald Ford writes a book saying that when he was President of the United States, he

considered making Ronald Reagan Vice President, that is a major political statement. He is planning to -- he is planning a presidential campaign against the man, says he is unqualified, yet two years before he considered making him vice president. That is what I mean about what Gerald Ford does is news. And if Gerald Ford did it today -- if Gerald Ford breathed today one criticism of Ronald Reagan's speech last night, that would lead most of the newspapers in this country. That would certainly be well within the consensus.

Q In your view, is what you have just said about the centrality to the very notion of the public's need to know of information with respect to President Ford, General Haig, et cetera, part of the consensus [347] as well?

A Yes. It was -- my memory, and my memory may not be perfect, that when the information, some of the information that came out in the book about Haig and Ford's negotiations and the pardon and what not, some of which was new, some of which wasn't, came out, that that was on the front page of the newspaper that I read. I was traveling through the south at the time. It was considered news by the editors of the papers where I was in that time.

MR. ZISSU: Could I just ask what date?

THE WITNESS: April of '79. My memory, and I may be wrong on this, is that I was traveling through New Orleans and Alabama on the book I was doing.

Q I want to direct your

attention now, Mr. Reeves, to the article --

THE COURT: Do I understand your view is that absolutely nothing that Gerald Ford has ever done is therefore other than news?

THE WITNESS: Adding the word "potentially," I would say yes. I mean, there are clearly things that are of no interest to anyone and there are other matters where taste and decency are probably involved. But potentially everything that Gerald Ford has done, does, and will [348] do with his life is news in the United States, or would be considered news by the professional community of people who put together news organs.

THE COURT: Is he therefore not

entitled to copyright protection as to anything that he's ever done? Is that what you are saying?

THE WITNESS: I don't know whether that's the case or not. I don't know much about copyright law. But I know that I never heard the word copyright discussed in a newsroom. I mean, we, the people who sit and put together papers, don't spend time talking about things like that.

THE COURT: We are going to have to --

THE WITNESS: Oh, no, you do, but --

THE COURT: I have to, because obviously this is a collision of copyright matters with other matters.

THE WITNESS: Right. I would only,

I don't know if I am speaking out of turn, if I were still at The New York Times or anyplace else and a manuscript, letters from a president, whatever, from a President of the United States about his public actions came in about the Mayaguez, about whatever, came in, the thought of copyright or whatever commercial use was being made of the property would not enter into my decision. [349]

THE COURT: Let's stick with -- forget the letters. Let's take a manuscript. Let's suppose you come into possession of a manuscript of a book of his that is about to be published. I'm sure, being an author yourself, your books are copyrighted and therefore you would be aware that this was doubtless either copyrighted or to be copyrighted.

THE WITNESS: Right.

THE COURT: In anticipation of publication. Are you saying that if you found something newsworthy in that book you would publish, irrespective of the copyright?

THE WITNESS: I would publish first, and think about it later. I mean, the difference between -- there is a great difference between Gerald Ford and me. I mean, I --

THE COURT: I am only talking about you to the extent that you uniquely are aware, and an awful lot of reporters may not be, of the fact that a book of this kind is a copyrighted instrument and therefore it would be in the back of your mind, Ford is copyrighting this for Harper and Row.

THE WITNESS: I don't think it would be in the back of my mind. I know that obviously I had conversations with -- I mean, I am aware that copyright [350] is at issue here. But I think in conversations with Mr. Abrams, I pointed out the fact that I had never heard that word mentioned at a newspaper or magazine in consideration of whether something should be published or not. And I don't ever remember it being in the back of my mind.

THE COURT: I am talking about if you were responsible for publishing or not publishing the contents of the manuscript of a book that came in, you have come into possession somehow of the manuscript of a book, you are aware that that probably is a copyrighted document

or to be copyrighted prior to publication and therefore there are copyright features about it that do exist. You certainly have that awareness.

THE WITNESS: I'm sure that is true, and I have that awareness at this moment. I have never taken that into account in any judgment that I have made. [351]

THE COURT: But you may never have been faced with that.

THE WITNESS: It's possible I never was. I just literally never thought of it.

THE COURT: If you were faced with it -- you see, I'm not going to charge you with what others may have done, but Professor Friendly, whom I am sure you know --

THE WITNESS: Right.

THE COURT: Probably socially as well, yesterday acknowledged to me that he would be on the phone to his lawyer saying, "What are my copyright problems," before he would publish. May I ask whether you would have a similar concern?

THE WITNESS: With -- I would not -- it's a hypothetical situation.

THE COURT: Yes. Well, it isn't --

THE WITNESS: If it concerned a President of the United States --

THE COURT: It is to you, it may not be to somebody else.

THE WITNESS: Right. If it concerned a President, a potential president, I would not -- I wouldn't need a lawyer to know what I was going to do.

I would consider it my professional obligation to transmit that [352] information.

THE COURT: To focus on one aspect that Professor Friendly and I discussed at some length yesterday, there is a description of President Nixon in a hospital setting, where President Ford goes to visit him. Do you feel that that description is news?

THE WITNESS: I thought it was big news. I was with Gerald Ford that day. And Gerald Ford, among other things, has always talked -- this is almost personal -- has always talked about his great credibility, and truth is the glue that holds us together to quote his wife's stitching, which becomes news. The version in the manuscript is different in a

number of particulars from what happened that day. So that I think that it was very revealing about one of the most important figures in our country; that that particular part of the manuscript was in fact news for that reason. It was certainly news when he gave a different version of things at the time. So, therefore, correcting the record as soon as possible was certainly news.

Q Can I just interject. Can you expand a bit in response to Judge Owen's questions, how was it different from the record at the time? [353]

A The difference in the manuscript is where Ford goes through his own thinking in whether or not he was going to see Nixon, which at that time was a very big issue is quite different.

He was denying in public up to a couple of hours before that he had any intention of seeing the President. And his spokesmen were denying at that time that he had any intention of seeing President Nixon or that that had anything to do with the fact that he had traveled to the West Coast.

Then, after he came out, and then of course it's clear from the manuscript that he intended to all along, and journalists that said they believed he intended to were -- the press office of the White House attacked those journalists for speculation, the usual things that are said. And then when he came out from seeing President Nixon, he gave -- I was actually stunned by the words in the manuscript about "I had

never seen anyone so close to death" kind of thing; because he said much different things when he actually came out of that room. He gave the impression that Nixon was in pain, in discomfort, great discomfort, but that he was fine and well. I mean, questions of Mr. Nixon being near death and what not, were not part of that particular day.

THE COURT: All right. [354]

Q Mr. Reeves, I want to follow up on one of Judge Owen's questions to you about what you would have done and what ordinary journalistic practice would be if you had gotten a chapter from the manuscript --

THE COURT: Can I go back for just a minute on this?

MR. ABRAMS: Of course.

THE COURT: It therefore is news if, as you contend, it demonstrates different versions of a different -- of the same incident which either cast light upon general credibility or the public face that one wants to present at a particular time, correct?

THE WITNESS: Yes.

THE COURT: All right. This does not do that. This does not purport to draw a comparison with an earlier public statement and therefore present what you regard as the newsworthiness of it.

THE WITNESS: I don't understand that.

THE COURT: And therefore why is it therefore news if you have left out the thing that you say makes it newsworthy, which is the drawing of the comparison?

THE WITNESS: I'm not sure that we are talking about the same thing. If I run in my newspaper a story saying Gerald Ford decided at the last minute to see [355] President Nixon and I later find out that that was not the case, I owe it to my readers to tell them what the case actually was, in his own words.

Q I think, if I may, Mr. Reeves, what Judge Owen is asking you, if I may, Judge Owen, I'd like to put the article in front of you and ask you a question about the passage of the article itself. The article is listed as Plaintiffs' Exhibit 10. Could you direct your attention to the paragraph on page 364 which starts with the word "Later," and read it to yourself first.

(Pause.)

A Yes.

Q The question I want to ask you about it is, is the material in that paragraph starting with the word "Later" and through the phrase, "I had never seen anyone closer to death," newsworthy information as it is presented in The Nation article?

A Yes, it is. And it's partly newsworthy because of the contact between any publication -- not The Nation, but particularly continuing daily publications and the readership. Journalism, news, I think, is a kind of running and by definition somewhat inaccurate representation of history as it goes by. So that part [356] of the obligation of the people in the business is to continually update on what later

turned out to be -- you see it every day in the papers -- what later, what you once reported, believing to be the truth -- not truth, that is a strong word -- believing to be accurate, later finding out it was not quite accurate. If you are fulfilling your real obligation to the people who read you, you try to keep those things in line, to give them -- to update those past pictures which were really snapshots of the parade as it went by.

Q But is it newsworthy if you publish it and you don't contrast it within the article itself with what President Ford may have said earlier?

A Well, I would have contrasted it. But that's -- I didn't understand the -- I now understand what the question was.

Q That is what Judge Owen was asking you.

A Yes. I brought knowledge, obviously -- yes, I brought knowledge to this situation that other readers might not. I personally would have contrasted it if I used that bit, I would have used that bit too.

THE COURT: Suppose you used that bit and had no knowledge of the possible contrast?

THE WITNESS: Well, I might not have used [357] it if I didn't have knowledge of that --

THE COURT: Of the contrast?

THE WITNESS: Yes.

Q Have you a view as to whether the precise fashion it was used in The Nation article, starting with the word

"Later" and winding up with "I had never seen anyone closer to death" is itself one appropriate way to deal with this?

A Yes. I mean, it's another person's judgment. I mean, my judgment would have been different, but that doesn't --

THE COURT: To deal with what?

MR. ABRAMS: To disclose the information, your Honor.

THE COURT: I'm not sure in what context you are asking it.

MR. ABRAMS: I am asking the witness whether notwithstanding the fact that he has told you in response to your questions how he would have treated this particular topic if he has a professional judgment as to the treatment given it here. I certainly didn't call Mr. Reeves --

THE COURT: No, but I gather Mr. Reeves, by his very last answer to me, has indicated that if he hadn't -- had no awareness of the potential contrast he [358] would not have run this paragraph, which is what he told me.

MR. ABRAMS: I think he said he might not have run it.

THE COURT: No, I think he said he probably would not have run it. His answer, therefore, suggests that he does not regard it as that newsworthy --

THE WITNESS: I agree with the first part of what you said. If I did not have that knowledge, I might not have run that paragraph.

THE COURT: Right.

THE WITNESS: But I do think -- I mean, the paragraph is newsworthy. I

did have that knowledge. So did most of the American people.

THE COURT: You are sort of coming in the back door, having gone out the front. All right, go ahead.

Q Why don't we take the article part by part, Mr. Reeves.

A I can look at it.

Q Yes. And go through it. I am going to ask you as to the various elements in it whether you consider the material there newsworthy as of April, 1977. You have already dealt with the disclosure by President Ford [359] that he might have selected Ronald Reagan as his 1976 running mate, but for a misunderstanding. I am now referring to page 1 of the article. What about the statement that Edward Bennett Williams,

a Democrat, was President Ford's choice for head of CIA?

A You know, I don't think that that is major news, but it is news. It is certainly interesting. And probably it falls within the definition of what people need to know. They certainly need to know that -- you've got to remember that at that time Edward Bennett Williams was treasurer of the Democratic Party, so that it certainly gives people an idea of how Washington really works at a place. So I would think -- I don't think it's a major revelation, but I certainly think it's news. [360]

Q What about the statement that Nixon was the one who first proposed Nelson Rockefeller for vice president

and that President Ford regretted his cowardice in allowing Rockefeller to remove himself from the vice presidential contention?

A I found that -- I don't know if this is responsive. I thought that was news and had a lot to do with current politics. In the first place, that was a revolution -- a revelation. To my knowledge, no one knew that Nixon had proposed Rockefeller or that Ford regretted that. The fact that Ford regretted it is interesting in a lot of contexts, including the fact his running mate was Robert Dole. Ford is essentially saying, to me at least, that if I had stuck with Rockefeller I would have been reelected, and it was an attack on Dole, who also was then a -- I think by

this time Dole had already announced his candidacy for President of the United States.

Q Turning now to the description in the number of paragraphs that followed about the pardon of President Nixon by President Ford, and your view as to the newsworthiness of the material contained in those paragraphs.

A I thought they were newsworthy. Some of it was repetition of what Ford had said before the Judiciary Committee. What was not repetition --

[361]THE COURT: Where are the minutes? Do you have the Senate minutes, the House transcript?

MR. MILLER: It's Exhibit 15.

A I suppose, like a lot of other reporters covering it at the time, I

felt in some way some sort of clearing of the record when Ford admits in the book for the first time that when he went to Jackson, Mississippi -- it says here Michigan, by the way, it was Jackson, Mississippi -- and when Ford said he went down after knowing specifics from the tapes of what later came to be called the smoking gun, at the time. And my memory is before the Judiciary Committee, Ford took the position that he only had third-person or hearsay or what not, that he didn't directly know of the evidence and therefore that was his justification for what he did in Jackson. In the book he says that, "I didn't want the whole thing to come tumbling down," which to me at least in evaluating his character, which is part

of my own professional role, was a significant admission, and also underscored the fact that Gerald Ford was not this naif stumbling across the countryside. He was an intelligent, calculating American politican who was in control of himself and his circumstances, which is the picture he presents in the book. [362]

That was not the picture he presented at the time. At the time it was kind of, well, gee, I really didn't know, because I only had Haig's word for it. I had not seen it myself. In the book, it was clear he knew what was going on and he made a decision to tell the people at Jackson something other than what was going on.

Q Are there other elements of the discussion in The Nation article

with respect to the pardon which seemed to you particularly matters of new disclosures?

A I don't know of new disclosures. There may be, and my memory may fail me on some of the things. The picture in the book, and the picture which is presented here, makes clear, at least to me, one reader, and it would if I were an editor of a paper planning to come out the next day, that Gerald Ford had been informed of the pardon, that the negotiations on the pardon -- it wasn't only the subject had been broached, that in fact for all practical purposes there were negotiations and some assurances were passed. Which is why Bob Hartmann, this is all new information, the fact that Ford had these

meetings and what not and then decided to come back with a written statement saying, "I don't know anything. Don't hold me to anything. I want that on the record [363] and I have written that down."

That's all new information and is not the portrayal of a man having a casual conversation with Alexander Haig. I mean, this was in the language that politicians use, and in the moves they go through, this was as far as I was concerned a negotiation and it was revealed for the first time -- it was admitted to for the first time. It was believed by some before that.

Q When you refer to Mr. Hartmann you mean the conversation between President Ford --

A The conversations with Bob Hartmann, John Marsh, and so forth, which were new information. That Ford clearly understood the import of that meeting with Haig. He clearly understood that the pardon was not talked about in passing, that list of options. Because, after all, when he then went back to meet with his own people he didn't say, "let's talk about this list of options." It becomes apparent from the book that he talked about the pardon. They are talking pardon. "What should I do?" His people then said, "Well, what have you done?" He said, "Well, I talked about it." They said, "You have to say" -- and obviously the whole thing was gone into then. [364]

That is a different picture, I

think. I think that is news, and it is news in an obviously important event to Americans who lived through that period, and Gerald Ford's whole political career in 1979 and in 1980, and now in 1982, revolves around that incident. There have been other books written. One of the books written about Ford was just titled "The Man who Pardoned Nixon." And people knew enough to know who that was about. It is a critical -- I mean, his life is going to turn for better or worse on that decision he made, so the way he made it is pretty compelling stuff, interesting and news.

Q Could you direct your attention in the article to page 364, which is the second page from the end, and to the description of the conversation

between Mr. Ford and Secretary Kissinger at the bottom of page 364. Have you a judgment as to whether that material is newsworthy?

A It is. There are two things. I mean, it sheds a little light on Kissinger, who obviously is an important individual in the way Americans live. And also the discussion in the manuscript which isn't gone into very deeply here about that Kissinger-Schlesinger relationship. [365] Who fired whom? Who was the winner, who was the loser? What did that reorganization really mean? Obviously, all of us can never know enough about Henry Kissinger, because there is always that chance that he will be running the foreign policy of the nation again.

Q Is information of this sort about Mr. Kissinger relevant information in 1979?

A Yes. Kissinger is certainly within that group of people who people need to know about, and then the resonance of some of these things -- I mean, Kissinger was the key figure in what then became the Reagan-Ford negotiation in 1980. It was Henry Kissinger who was pushing the Ford vice presidency in Detroit in 1980, which is a continuation of this. All of these events are central to the leadership decisions of the Republican Party, which, as we know, runs the country at the moment, politically runs the presidency and one house of Congress.

Q What about the material on --

A These are important events.

Q I'm sorry.

A I mean -- I suppose a well-informed voter might not necessarily have to know them all, but would [366] want to know them if they were going to evaluate do I want Henry Kissinger to be the Secretary of State of the United States, do I want to push a candidacy which will lead to a Kissinger stewardship?

Q What candidacy is that?

A The Ford candidacy of 1980.

Q What about the material on John Connally in the right column?

A The same thing. John Connally was then running for President of the United States. The fact he had this past implicit endorsement of Connally,

and Ford's at least passive acquiescence, is very important in public decisionmaking.

Q And the material entitled "On the decision to run again"?

A Well, it has certain news value in that it indicates Ford was sincere, which many people -- he was attacked because he had announced that he wouldn't run again when he was vice president, he had announced he would never. So it tells a little about that. To me it is newsworthy again because it sheds light on Kissinger, and the fact that I took this to mean, and I took Ford as understanding it, too, in the book that Kissinger essentially was trying to promote the Ford [367] presidency and Ford strength to preserve his own position.

Q The material on David Kennerly, the White House photographer?

A Well, I found it fascinating. I thought that that was a valuable civics lesson for the country, that that in fact is how decision-making is made. Also, Dave Kennerly is a friend of mine. I didn't know he had that much influence. I also thought he made the right decision. My own view of what is newsworthy is that in a democracy it is extremely important for people to know how decision-making is actually made and if the President feels this was key to his thinking, so I found -- [368]

THE COURT: Are you drawing from that incident the fact that a White House photographer is in fact making all the big decisions in the Ford Administration?

A No, but I am drawing from it that people gather where life is at stake and national policies and what not -- gather and have no outside input at all and often consider the narrowest of extreme options, do nothing or attack massively, and that the decision-making processes tightly held often lead to that kind of polarized debate. Suddenly someone walks by and says, "Look, why don't you" -- and they say, "Yes." I don't think Kennerly made decisions in that administration, but it shows the danger of any of us making decisions in that kind of closed circle.

THE COURT: That could happen with any president at any time?

A Indeed, and that's illustrative. I am sure it has and can and

will. I think that that piece of news is more than most persons learn about presidential decision-making in high schools. I find that an extremely valuable object lesson in decision-making in a democracy.

THE COURT: You know, I am reminded of that very famous story that appeared in Reader's Digest. [369] Probably in the thirties is the first time I heard of it. The truck that had gotten wedged under a bridge and everybody was sitting around trying to figure out how to get this truck out from under the bridge, such as wedging the bridge up a little bit and people standing on the top of the truck to try to push it down and finally some ten-year-old boy walks by and says, "Why don't you let some air out of the tires?"

A I think it's the same story.

THE COURT: It's the identical story.

A But if they roped off the area and only Gerald Ford, Henry Kissinger and James Schlesinger were let near the truck, they would have blown up the bridge.

THE COURT: Well, that may be. On the other hand, you don't get the impression from this that this photographer was any less cut off from the outside world than anybody else because he, too, was part of the inside circle.

A I don't think that --

THE COURT: Both you and Professor Friendly put some emphasis on this, and I am just utterly unimpressed with the fact this is other than a fresh view

that happened to come in from somebody that could have come in from somebody else. [370]

THE WITNESS: I did not know, obviously --

THE COURT: So I don't see the impact of that at all.

THE WITNESS: I don't know if that adds one way or another. I did not know that he had said that. But I think that Gerald Ford is also on our side. I think that's why he wanted to tell that and he can do it to point up the danger of not having that type of fresh air or not having the ten-year-old walk by.

THE COURT: All right. You have stated flat out this shows how decisions are made in the White House and I just didn't draw that conclusion from it at

all. I regarded that as a human interest story, something where somebody happened to bring a brand new perspective to it that others had up to that point certainly missed. Maybe at some point somebody would have come up with that on their own.

A This is really off the subject but I would take it, and I think Ford meant it as a parable on the dangers of tightly held decision-making, and I took it as a very kind of positive example. I mean the other options they were discussing that night could have led to some very horrible consequences over what may well have been an inconsequential incident. [371] I think that was my impression, that Ford was projecting that as an object lesson for the rest of us.

THE COURT: Let me turn to something that I have been sort of also scanning here as we go along. I have before me the President's book at pages 4 and 5. I have the Hungate Hearings, Exhibit B at pages 94 and 95, and I have The Nation article at page 363. Now, I gather that one of the things that you regard as newsworthy is the fact of his calling up Haig, having been given Haig's various options in a face-to-face confrontation which he says came to him as quite a shock --

MR. ABRAMS: I respectfully object. I really don't believe, and I don't want to prompt you or lead the witness, but it was not my recollection that the witness had said that he did not know that the president had called Haig. I thought --

THE COURT: I understand that. I accept the fact that he knew the President had called Haig. Now, if you read the Hungate Hearings you get all of the options that are mentioned in the book.

THE WITNESS: Right.

THE COURT: So when the book comes out [372] the fact of the options has been public knowledge since 1974.

THE WITNESS: Right.

THE COURT: That's five years earlier. You get from the Hungate Hearings the fact that he told Haig he wanted some time to think and did not say anything in response to Haig's proposals of the options, including that there might be a pardon to the President should he resign.

THE WITNESS: Right.

THE COURT: You get the fact that he talked to St. Clair and St. Clair said really nothing to him except that he was not the source of the option to trade a pardon for a resignation. In the Hungate Hearings President Ford says "After thought on the matter I was determined not to make any recommendations to President Nixon's resignation. I had not given any advice or recommendations in my conversations with his aides" -- which I assume included Haig -- "and I also did not want anyone who might talk to the President" -- and that I assume was Haig -- "to suggest that I had some intention to do so." Now, the book, although it fleshes out talking to --

[373]

A Hartmann and Marsh.

THE COURT: Hartmann. Suggests that the call to Haig was motivated by Hartmann saying, in effect, "Mr. Vice President, you may not appreciate how this is going to land on the other end, and I think you ought to say something about it." But except for the fact that Hartmann is the instigator of the call everything else is in the Hungate Hearings.

THE WITNESS: This is just a matter of judgment. My feeling is what was not in that hearing was -- for instance in the book he quotes Hartmann as saying -- his chief aide as saying -- "Mr. Vice President, you just agreed to pardon the President." "Silence implies assent," is the quote in the book, as I recall.

THE COURT: No, you are a little

stronger than the book. The book reads he said, "He (Haig) probably went back to the White House and told Nixon that he had mentioned the idea and you weren't uncomfortable with it." That is, as I read it, the high water mark. And suggested that he had an obligation at that point to make it perfectly clear that he wasn't going [374] along with it.

Omitting that, Ford says in the Hungate Hearing, "After thought on the matter" -- which doesn't necessarily preclude his having talked to Hartmann -- "After thought on the matter I was determined not to make a recommendation, and I didn't want anybody who might talk to the President to suggest I had some intention to do so." That's exactly

what the book says he did, and what I am getting to you is, what I am suggesting to you in the form of a dialogue between us, is what about the book -- and I am using the book and the manuscript which is used for The Nation article interchangeably at this point -- what about the book has become such news as to require a court to permit this to be a fair use, permit The Nation's article to be a fair use of an obviously copyrightable or to be copyrighted document, to avoid the copyright protection that initially attached and has to be set aside for some valid reason? What's the fact that he talked to Hartmann, what about that is the great piece of news, because that's the only thing I see in here that is a difference?

THE WITNESS: Obviously I can't answer a what-about question. I can only say that if it were [375] me, and I had that on my hands, I would have published it, and I think almost everybody else in American journalism would have done the same thing, and I think that their view would have been that this clarifies the issue of did -- which I felt, and this may be different readings from having sat at the Hungate Hearings, having written about them, having written a book about them, that Ford was taking the position that he didn't understand out of those conversations that the pardon was the clear issue, and also there was a lot of backgrounding going on at that time by his people that this was just one of the things talked

about. It seemed clear to me from the manuscript of the book and the book itself that Ford knew exactly what the issue of those conversations was. The issue was, was Richard Nixon going to be pardoned.

It may be two people's reading of the same words, or seeing the same scene, but that's what I thought had changed in four years between the hearings and the book, and that it clarified in my mind as an observer that Ford has now conceded he knew what was going on in those conversations, and that's that what the subject really was. It wasn't a list of options. It wasn't a long conversation. That the key point of those conversations [376] was that pardon. That's what he went back and

talked to his own people about, and that's what he called the White House back about. [377]

THE COURT: And I take it that it's on that nuance between the book and the Hungate Hearing that you say that in your expert opinion the revelations of the book have become sufficiently newsworthy to justify its publication by somebody, at least arguably in violation of the copyright laws?

MR. ABRAMS: I object to the form of the question.

THE COURT: The objection is overruled.

THE WITNESS: For better or worse, those nuances are the stuff of which the news business makes decisions. It is an editor's judgment as to which of those

nuances are important to the people who read my journal, watch my show, vote in this country: Is that nuance important to them? My professional judgment is yes, it is. Each editor makes that decision at a given time. There may be disagreements among them, but there tends to be some kind of -- as we talked earlier, some kind of consensus comes out across the country.

THE COURT: And just fleshing out what Mr. Abrams has said, because I don't want there to be any question in our dialogue as to what we are talking about, the nuance that I see is as between the Hungate Hearing and the book, you say it has been made clear [378] that when he called Haig back, he was talking about the pardon and nothing

else? And what the Hungate Hearing did not make clear that he was talking about the pardon as opposed to talking collectively about the six options that he had been given.

THE WITNESS: The Hungate Hearing and the interviews that were being given by Ford's staff at the time -- the Hungate Hearings were only part of an event as seen by journalists. Because we were being called into the White House to be briefed at the same time by Bob Hartmann and other people, saying, this is what it really means; because the White House at that time was trying to get, my memory and my opinion is, the White House at that time was trying to get across the impression that the pardon discussion was no big deal in the

context of these conversations. Five years later, when it seemed to make less difference, it seems to me the former president in his book was willing to concede the point that perhaps it was more central within that context.

THE COURT: Even here now, you have watered it down --

THE WITNESS: I am trying to use judicious language. [379]

THE COURT: I know, and I want you to use careful language because I am using careful language on you. You used the expression he conceded that perhaps it was more important than he saw at the time.

THE WITNESS: I would take out the "perhaps".

THE COURT: Why did you use it in the first place?

THE WITNESS: But I would add, in my mind, in my observance he is now willing to concede something he was not in 1974.

THE COURT: You see, in the book, he doesn't concede that he had an awareness of the focus of the pardon issue until he first talked to Hartmann. So that when he left -- when Haig left and he started talking to people about what should be my position vis-a-vis what I have heard, Hartmann is rather critical of the fact he did not have a witness in the room, and Ford says, "What do you mean?" And the answer is "The last option Haig mentioned was that Nixon resign and in return for an agreement that he receive a pardon from the new president. I don't like that at all."

"To which Mr. Ford says, 'But Bob, Al wasn't suggesting that. It was just one of the ideas he said were being kicked around by people at the White [380] House.'" So even in the book he has not yet come to an awareness of the fact that that's the focus. So the only time this focus, this nuance that we are talking about, comes into effect is when Hartmann thereafter points out to him a misconstruction that might be placed upon his silence with regard to that one option. Right? I am saying to you that reading Hungate versus this section of the book, the only difference between Hungate and the book is between the time Hartmann speaks to him and he speaks with a couple of other people and makes his call to Haig. Otherwise, Hungate has everything in it this book has.

MR. ABRAMS: I object to the form of the question.

THE COURT: The witness was at Hungate and the materials are here and you are at liberty to look, and I looked at the pages. I trust I can read as well as the next man.

THE WITNESS: I'm not sure I understand the question.

THE COURT: Well, the question is, what becomes newsworthy about this to have you say to me that a person's copyright rights in a document should be violated without consideration by an editor who happens to look [381] at the typescript of this manuscript and says, I am going to go publish --

MR. ABRAMS: I object to the form.

THE COURT: When it is in fact already --

MR. ABRAMS: The witness has not so testified. The witness has given no testimony about the copyright law or overcoming the copyright law. That is a legal issue.

THE COURT: I know he hasn't, Mr. Abrams. And he said he wouldn't have given the copyright laws a thought, although as a book publisher, as a book author he is aware that books have copyrights. He said he would have paid no attention to the copyright laws at all, he would have published. And I am trying to ask him what it was that he considers news here that would put him in the frame of mind, I am going to go ahead, and frankly I wouldn't even have thought about the copyright. I want to know what it is that inspires him to do that.

THE WITNESS: I have said what I thought it was. But in my mind, by the way, it doesn't make any difference whether my judgment was good or bad in deciding to publish. I mean, to me it seems quite a different question about whether an editor's judgment in a given situation is good or bad. That that does [382] not necessarily go to the principles of the fact that that's what his editor does, and it is his role, and a honorable one, to make those judgments, well or badly. I mean, editors decide what will be published in their publication. They may make mistakes in doing that, but that doesn't mean they don't have the right and duty to do it. I may be quite wrong in my interpretation of this.

THE COURT: Are you saying that arguably in this situation there may have been a mistake in the publication of this particular section we are talking about?

THE WITNESS: Well, there may be a mistake in my interpretation of this material. There may have been a mistake in this editor's, the editor of The Nation's, judgment of that material. That does not to me affect my own view of whether or not the editor should publish what he or she thinks is newsworthy.

THE COURT: Even at the risk of suffering the penalties that would flow from the mistake.

THE WITNESS: That is what publish and be damned means.

THE COURT: All right.

Q Mr. Reeves, you have testified that if [383] you had received this manuscript you would have written a story about it. What if you had known that two weeks later Time Magazine was going to excerpt portions of the manuscript? Would that have affected your judgment?

A No.

Q Why not?

A They run their magazine, I run mine. They want to pay for things, they want to make -- I have nothing to do with them. It might confirm for me that this is in fact newsworthy material, if they are willing to pay for it. But other than that, it wouldn't have any effect.

MR. ABRAMS: I have no other questions, your Honor.

THE COURT: We will take a recess. Are you going to cross examine?

MR. ZISSU: No, I am going to have to wait on that one, too.

* * *

[384]

DAVID HALBERSTAM, called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Mr. Halberstam, what is your occupation, please?

A I am a reporter and author, or both, whichever.

Q What is your education?

A I have a BA degree from

Harvard and subsequently some honorary degrees. But I just have one -- I have an undergraduate degree.

Q Your AB was in what year, please?

A 1955.

Q From where did you get your honorary degrees that you mentioned?

A Wesleyan College, Wake Forest in the Chicago area, Knox College, and Columbia College in Chicago, and a couple of others.

Q What was your first position after your graduation from college?

A I was the one reporter for the smallest [385] daily in Mississippi in 1955 and '56.

Q What was the name of that paper?

A It was the West Pointe Mississippi Daily Times Leader.

Q What did you do on that paper?

A I was the one reporter. I covered everthing tht there was to cover in West Pointe: politics, race, county agents, I became an authority, so to speak, on cotton, soybeans, beef cattle, and the running of a small town of 8,000 people.

Q What was you next position?

A I went from there to work for four years as a reporter for the Nashville Tennesseean in Nashville, Tennessee.

Q What did you cover there?

A I covered general assignments, police reporter, courts, and really essentially politics and race, because

it was from 1956 through 1960, which was a time of heightening civil rights consciousness.

Q Then what did you do after you left the Nashville Tennesseean?

A I went to work for the New York Times where I worked primarily as a foreign correspondent.

Q What was your first assignment with the Times? [386]

A I was sent to what was then the Congo and is now Zaire, where I worked I guess for about a year and a half under fairly volatile circumstances.

Q What was your next assignment?

A I was the New York Times -- I was the first permanent correspondent of any American newspaper in Vietnam.

Q When was that?

A 1962, '63, and into '64.

Q Where were you assigned next?

A Came back here for a year as a general assignment reporter and then became a correspondent in Eastern Europe based in Poland, traveling in Czechoslovakia, Hungary and Poland, where I stayed for about a year until I was expelled.

Q Why were you expelled from Poland?

A Well, I am an assertive and aggressive reporter and I am contentious, and I was many of the things which have now come to a head in terms of Solidarity were there, but slightly below the surface, but they were profoundly affecting that society. And one

could not be a reporter of conscience without reporting on them, and that put me -- the economic malaise, some of the anti-semitism, these things, were profoundly part [387] of the story and I was writing about them and that put me in an automatic collision course with the repressive government there. [388]

Q After your expulsion from Poland, what did you do next?

A I came home --

Q You were still with the New York Times?

A With the New York Times. I spent about six months in Paris, where I did not ennoble my reputation, came home, worked briefly in New York for a time, finished a novel, and in the Spring of 1967 became a contributing editor of Harper's Magazine.

Q How long did you serve as a contributing editor?

A I spent four very happy years there.

Q What did you do as a contributing editor?

A I was what is called a contract writer. I was supposed to do, I think, six pieces a year. In addition, I sort of functioned as a, I guess you would call national editor. I was almost an assignment editor, trying to figure out who we should get writing for a magazine and what articles. For example, when Bill Moyers had just left, not just the government, but Newsday, I think he had been sort of cut asunder by Capt. Guggenheim there. I thought, here's a bright, talented man who has

been in a high position in our society. Why don't we get him to just travel around the country and interview and do a piece on ordinary persons [389] and his feel for the country, and we published that, which also became a book. I think it was entitled, in fact, "Listening to America."

Q You were at Harper's for four years?

A Four years, yes.

Q Until what year?

A I left there in 1971, as I recall, the spring of '71, and went on to become a full time writer of books.

Q What books had you written before you left Harper's?

A I had written a book on the darkening cloud in Vietnam called --

that was written in '64 and published in early '66, called "The Making of a Quagmire." I subsequently wrote a novel on Vietnam, called "One Very Hot Day." I wrote a book about the turbulence in America in 1968, which I had considered a short of watershed year of all the social conflict. It was about Bobby Kennedy as well, it was called "The Unfinished Odyssey of Robert Kennedy." And then in 19, I guess it was '69 or '70 -- '70, maybe, I wrote a very small essay biography of Ho Chi Minh, called "Ho."

Q When you left Harper's to become a full time [390] author of books, what books did you write?

A Well, the first one that came out in the time when I was a full time

author was a book of how and why we went to war in Vietnam, and it was called, "The Best and the Brightest."

Q In what year was that published?

A It was published in the fall of 1972.

Q What was your next book?

A I did a long book on the rise of the new modern media machinery in America and how it makes its decisions and how it affects our society, and that was called "The Powers That Be."

Q Did you focus on a particular media or corporations in that book?

A Yes. Particularly it was about the rise of what television has done to us in general. But I focused I think on really four or five major

institutions: CBS, the Los Angeles Times, Time Magazine, the Washington Post, and to a somewhat lesser degree, the New York Times.

Q And have you more recently published a book?

A I have a book out which hangs on and off the lower rungs of the best seller list. It is a book in effect different from most of what I have done. It is on a season in commercial sports and it's out now called, "The [391] Breaks of the Game."

Q Is that about professional basketball?

A It's a season in professional basketball, yes.

Q Have you won any awards, Mr. Halberstam?

A Yes, I have won some minor awards in Tennessee. When I was in the Congo in 1961 I was nominated for the Pultizer, but did not win it. And I won instead something called the Page One Award of the Newspaper Guild. And then I won a number of awards for my reporting in Vietnam and subsequently.

Q Did you win the Pulitzer Prize?

A Yes, I won the Pulitzer Prize for the reporting in Vietnam in 1963, and I won an award which I am very proud of, put out by the Nieman Fellows in Harvard, who are senior journalists who go there for a year, called the Louis Lyons Award, it's given for conscience and integrity in journalism. I think I won a George Polk Award and a couple of

other awards in the Vietnam war as well. And I subsequently won some minor awards for my books, and I am very proud of the fact that both were nominated for National Book Awards, which is considered -- the nomination for National Book Award is considered almost like an award.

Q By both books, you mean "The Best and the [392] Brightest"?

A "The Best and the Brightest" and "The Powers That Be," yes.

Q In your capacity as journalist, did you have occasion to focus on what is newsworthy and what is not?

A Yes. I think it's really part of my life, and I have grown up sitting there trying to figure out what is news, talking about it, arguing about it,

being a part of it. I think one of the things I liked about being a foreign correspondent, when you were the one New York Times man in all of Central Africa or when you were the New York Times man in the very important story like Vietnam, you were not just a reporter, but in effect you were a managing editor. You were your own managing editor. You had to anticipate what was news, think about it, and think about how to dramatize that, because -- the foreign editor would never say, "I'd like a story on." So you were sitting there in effect doing your own assignments. You were figuring out. And I liked that. Since I have left daily journalism, it's been a continuing interest of mine and in fact, when I did

"The Powers That Be", one of the things that that book centers on is the decision of news, what is news, the decisions that the [393] New York Times or the Washington Post or CBS made in running stories either in Vietnam or in Watergate or over civil rights.

Q Have you read the Nation article of April 7, 1979 entitled "The Ford Memoirs: Behind the Nixon Pardon"?

A Yes, I have.

Q When did you first read it?

A I have a memory of reading it in sort of the small contretemps that followed when it came out I guess a couple of years ago.

Q Have you reread it in preparation for your testimony today?

A I have read it quite carefully since.

Q Have you also read a typed copy of Chapters 1 and 3 of the manuscript of President Ford?

A I have read much of the manuscript beyond just 1 and 3. I have gone back and I haven't read the whole manuscript, but I have tried to familiarize myself with the larger book. Not just the "news" but a sense of the texture of that book, because I think that is a crucial word in all this.

Q That is the book itself, by President Ford?

A Yes.

Q In reading the manuscript and the text of [394] President Ford's book "A Time to Heal", did you come to any judgments about whether there was newsworthy material in there?

A I think it's quite newsworthy, yes. I think that there is news in a presidential document like that. That is a presidential document. That is not just a book. I mean, those are not just impressions of a citizen about the world around him. That is the witness, and I mean upper case W, of a President of the United States about the most important events of his presidency. And that is news.

Q Were there particular portions that seemed especially newsworthy to you?

A Well, we come to this with prejudgment. I mean, I don't come as an innocent because there is already the hoopla. I mean, we are preceded by a history of the Nation article. But my

sense is coming in on it that I very strongly calibrate and would authenticate Mr. Navasky's judgment of what the central news of that document is.

Q What is that?

A Well, I think it is about the pardon. I think that is a crucial event of the Ford presidency; not just a crucial event of the Ford presidency, but in fact a surpassing event of the last 20, 25 years [395] in American politics. You have to go back to the time of Andrew Johnson, when to have impeachment proceedings hanging so heavily upon our society, the texture of the nation stretched so thin, a president comes in, will his predecessor be fully impeached, will the legal proceedings continue?

Instead, the new president,

who is viewed as a sort of breath of fresh air in all this traumatic experience of Watergate, pardons him. Because of his pardon, or at least in part because of his pardon, the new president has a great deal of problem being elected thereafter. So it is a great deal of important news and historical decision.

Q I would like to direct your attention to the Nation article itself, Mr. Halberstam, and to ask you some questions about the specific material contained therein, and I would like to put before you first Plaintiffs' Exhibit 10, which is a copy of the article. That is the article that you have read, Mr. Halberstam?

A Yes. Excuse me. Yes.

Q I want to take you through it part by part; and if you direct your attention first to page 1 of the article, the statement is contained there that "But for [396] a misunderstanding, President Ford might have selected Ronald Reagan as his 1976 running mate." Do you consider that a newsworthy disclosure?

A Well, it's newsworthy. It's not as paramount as the news about the pardon and the description of the process of the pardon. It's certainly newsworthy, for after all, we have Mr. Ford, who is an ongoing politician, talking about decision A, about Mr. Rockefeller, whom if he had named as vice president might have been reelected. I think in his own opinion, I

think he shows in his book that if he had kept Rockefeller he would have been reelected, instead of Dole. That is very newsworthy.

And what he says about Mr. Reagan, who was then very much a man hovering slightly off center stage, but was there as a potential presidential figure. I mean, a man - one was aware in 1979 that Ronald Reagan fully intended to run for the presidency, what the one said about the other, since there was a constant undercurrent of sense of bad feeling about the two. I mean, it would come out from time to time in fact there was not a great amicability between them. What he says about that, I think is clearly news, yes. [397]

Q What about the reference, Mr. Halberstam, to the fact that President Ford had as his choice for head of CIA Edward Bennett Williams?

A Well, that's news, I think. It's always in the eye of the beholder. And Ed Williams is certainly a major figure, a great wheeler-dealer in the sort of Clark Clifford tradition, and the idea he would take a major Democrat and put him at the CIA is above the level of titillation, it is news, and falls below the powerful, I think, series of things that came out on the pardon, which I put at a far higher scale.

Q As regards the pardon, Mr. Halberstam, and the material in the article about the pardon, can you tell us why that is newsworthy?

A Well, I think people are going to be arguing about the pardon and about Watergate for a hundred years. Here is the man who made the pardon, which possibly cost him his reelection, and it is his most important final -- I would say his final witness, when a man publishes his book that is his final witness, so that is his signing off on it, and it is an enormously important moment in American history.

In addition, in terms of news it is the word of Gerald Ford, a once and possibly would be again presidential [398] contender, because at this time it was very clear that he was letting people know that he would in fact like to run again. It involves, and I think this is possibly the most important news

-- and I underline the word "news" -- it involves the role of General Haig, who was at that moment making very clear that he wanted to come back -- I believe he was still at NATO -- come back and run for the presidency. He was leaking to selected columnists who would visit him in Brussels that he would think of an Eisenhower-like return -- and who is, in fact, a major player and remains a major player. And it is also about Richard Nixon, who is a major player in our ongoing national dilemma who even to this day -- I mean, Watergate did not end the public career of Richard Nixon. Even since this has happened he has gone to the funeral of Sadat and he departed that, apparently unbeknownst to the President, to visit Saudi Arabia, a suprise to the Secretary of State, as a representative of the United States.

These are three major players. Particularly with respect to General Haig, the new light is about him, and he is a very important man, and we know one of the things that helped him get the job as Secretary of State, [399] according to the news reports since then, was the recommendation of former ex-President Nixon. So this is very germane.

Q Is it newsworthy, Mr. Halberstam, the description of the pardon here, if in fact good parts of what is contained here were already set forth by President Ford in the Hungate Committee hearings?

A I have not a wildly clear

memory of the Hungate hearings, and it is possible that parts here overlap, but it seems to me I have no memory at all of Haig's role ever being so clear, clearly defined. I think the thing about General Haig coming in, Mr. Ford is obviously a very nice man going along with it and Hartmann saying, "You have made a mistake." What is the phrase, "Your silence can be interpreted as acquiescence"?

THE COURT: "Silence implies assent."

THE WITNESS: That is very important.

A I don't think that is in the Hungate hearings at all.

Q Why is it important?

A Why is it important?

Q Yes.

A The role of Mr. Haig in all this is very important, very controversial and still being debated. What role [400] was he in? I think it's implied to some people he was anti-Nixon, was trying to hold the country together and thought Mr. Nixon was no longer coherent. There is a real implication that Mr. Haig in fact it seems to me is bartering for Mr. Nixon in this case, or at least is interpreted certainly by Mr. Hartmann, a very shrewd insider on Mr. Ford's staff, that he is bartering for Mr. Nixon, since Mr. Haig has continued to be a major player in our society, a great internal bureaucrat. How quickly he has come up the ranks. How did Alexander Haig rise so quickly,

is a question. He is our Secretary of State. He has wanted to run for the presidency. It's possible that he will run again. He's very important. And what his role in that moment was is something terribly important.

Q I would like you to direct your attention to a passage on page 364 of the Nation article, Mr. Halberstam, in which President Ford describes how President Nixon looked.

THE COURT: Before we do that, can I just ask one question. Assume for a moment, Mr. Halberstam, and accept this as an assumption, that virtually everything that [401] appeared in President Ford's book as to General Haig at this particular juncture, this meeting about the pardon -- assume that that had all

been revealed by President Ford in testimony before the Hungate Committee. Would that change your view as to the, quote, newsworthiness of the repetition of General Haig's participation as it is revealed in the book?

THE WITNESS: I don't thing so, your Honor. I think perceptions of news, even when there are -- when part of it has been in the record or perhaps even all of it has been in the record.

THE COURT: Assume all of it has been in the record.

THE WITNESS: Even if all of it has been in the record the fact that this is a presidential document, this is Gerald Ford's own witness, his final summing up, not when he is before a committee or he is still an active officer with the

limits that that places upon him, but that this is his summing up, it's a presidential document, it is a state paper. It makes it news. You know news can be news even if, with all due respect, it is not news. There is a fascinating moment in the last few days which was in the paper today. An ongoing conflict, a CBS documentary about General [402] Westmoreland's allegedly tampering with his own intelligence staff when he was the commander of the American intelligence forces in Vietnam.

There was a documentary done Saturday night by a CBS young man named George Cryle, and it pointed out that Westmoreland had taken the figures of men like General Mack Chrisman's

intelligence man and George Arlen, his top man over there, and brought them down for whatever debatable reasons. That's news, and it is a very big story. It's in the Times and other papers. That was in my book nine years ago on Vietnam. But it's still news. For some reason it has come out because the debate continues.

Q Would it still be news if General Westmoreland held a press conference to deny the charges as he did nine years ago?

A Yes, it's still news because it has come out again. I mean, it's come out and somebody else has taken a slightly different thinking. Another reporter has come upon it. Maybe they chose not to -- maybe I did it in my

book, nobody picked up on it, and suddenly somebody from CBS stumbled upon it and said, that's a story and we can do it and it's news. It's still news.

Q Why is it still news? [403]

A It's in the eye of the beholder because the debate is continuing and because someone perceives it to be news. News is not an absolute thing. It's a judgment of a professional. Maybe the time has come, a certain moment, when they are really ready to do it. Maybe they only see it, maybe it only gels to them as news. Maybe they think the debate has changed, there is now a new burst of revisionism on Vietnam and therefore something like this adds to the debate.

Debate changes. Definitions of

society change. If we had looked on this particular article three years ago we might have looked upon it differently because Ronald Reagan might have been a peripheral player then, Alexander Haig might have seemed a smaller figure. The debate goes on and the debate changes, and news is a reflection of different trends in public affairs. One never knows with absolute certainty what else is added or how people will perceive the same set of facts.

Q As of 1979, in your view, did the debate continue about the pardon of President Nixon?

A Oh, yes. Oh, sure. I think it was the single issue that hung over a year later. I think it's the single most important issue that hung over

Gerald Ford's presidency, [404] and I think one of the things Mr. Navasky points out in his reporting of this is a sense of Gerald Ford coming to terms with that decision that he was damned if he did and damned if he didn't. That if he didn't pardon Richard Nixon, he was going to have his presidency exhausted by these kinds of ongoing distractions, that the center stage would not be his and his presidency, but it would be going over to the ongoing debate over Nixon, the pardon, and Mr. Nixon's own attempt to relegitimatize himself.

MR. ABRAMS: Judge Owen, did you have any more question is this area?

THE COURT: Not at this time, thank you.

Q Directing your attention now

to the first column of page 364, which is the next to last page of the article, there is a paragraph which starts out saying,

> "Later when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former president a visit. If I made the trip it would remind everybody of Watergate and the pardon. If I didn't people would say I lacked compassion."

And then there is a description of President Nixon in the hospital by President Ford. [405] Do you consider that material newsworthy?

A Yes, I think so. I think that how President Ford perceived Mr. Nixon at that moment, how it affected his thoughts and perceptions about the former president, at the moment when Mr. Nixon seemed to be apparently genuinely quite sick, I think that is

very, very germane. I think that is news, particularly since it is quite dramatic.

Q What about the material that follows that with respect to Mr. Kissinger?

A Well, I think that is what I would call ancillary. I think that is news. I don't think it is powerful or forceful. I'm not a close friend of Mr. Navasky's and I wasn't with him when he did this, but I can't believe that if this were the best stuff in the book he probably would have used it, run with it. I don't think he would have published a piece in the Nation if this were the strongest stuff he had. Perhaps once he was doing it he threw this in as newsworthy. It's important

because Kissinger is important, the relationship of Mr. Kissinger to Ford is important, but I don't consider it by any means as powerful as the preceding stuff.

MR. ZISSU: I object to the speculation as to what Mr. Navasky would have believed or wouldn't have [406] believed as distinguished from his opinion.

THE COURT: I will treat it all as opinion.

MR. ZISSU: Thank you.

THE WITNESS: Fine.

Q Mr. Halberstam, what --

A I guess I was speaking for myself. I am speaking as if I were the editor of this.

Q And continuing speaking -- well, not as if you were the editor, but

speaking as a person with the background you have and the knowledge that you have, would you address the question of whether the material on John Connally is newsworthy material?

A Well, I think that's newsworthy. John Connally was like Ronald Reagan at that time, a man about to make a presidential race, and, therefore, what Mr. Ford knew, what Mr. Nixon thought of him, and what Mr. Nixon thought about Mr. Agnew, is news, and I mean there was no telling that a year later that might have seemed a good deal more important than some of the other things had Mr. Connally made a stronger run than it turned out he finally did.

Q What about the next section, entitled "On the decision to run again"?

A Well, I think it's you know, I think that anytime the President does or doesn't want to run, that's [407] important news. If Mr. Ford had only -- had wilfully, deliberately, made himself into a one-time appointive or half-term appointive president and did not run again is news, the fact he was so inclined is news, and the fact it is Mr. Kissinger who talked him out of it I think is very much news. It is interesting it was Mr. Kissinger who talked him out of it. [408]

Q Why is that?

A Well, I think Mr. Kissinger is a man with an enormous instinct for power, and I think that is a constant pattern of Mr. Kissinger's instinct for power, including now his most recent

attacks on the foreign policy of Mr. Haig, which I think is intriguing. Mr. Kissinger is a subject of great controversy in this country and anything that adds to his own role -- and one of the things unwritten here is if Mr. Ford runs and is re-elected Mr. Kissinger stays on as Secretary of State.

Q What about the material on David Kennerly, the White House photographer?

A Again, I would consider that sort of ancillary. I think it's news and I think it's intriguing. The Mayaguez is an important moment in that presidency. It's particularly for people for whom the Tonkin Gulf looms very large. Tonkin, which is very comparable to Mayaguez, triggered off a war

that lasted us ten years. Mayaguez, which was in many ways simpler -- I mean similar -- did not turn into a larger war, but it had important bearings on attitudes of decision making. Therefore anything that is a reflection of what men like that were thinking at the moment is news, and the idea that the youngest man in the room, a photographer, makes a suggestion which [409] apparently affects how the senior officials of the State make their decisions, that's not just titillating, that's news. That's important.

Q What about the next passage with respect to President Ford's view on President Nixon's charaacter?

A Well, I think if you were a reporter and you were assigned to

interview Mr. Ford one of the first questions you would ask him among others is, "What do you think of Richard Nixon," so it's news. I mean this is a man who is your predecessor, who has had a great deal to do with your career, his shadow hangs over your presidency, what do you think of him? So what one president thinks of another -- particularly given the complexion of the strains that have run through those two presidencies -- I think that is very important. Part of the question it's answering goes back to the pardon, what went wrong with the man? So it's news.

Q. Have you a judgment based upon your experience in journalism and as a critic of journalism as to whether the Nation article has too many quotations in it?

A. Well, I thought it was quite understated myself. I wear two hats on it because I am a writer, [410] and a writer of books, and I feel very vulnerable to somebody who would decide to take my material and lift it off. It seems to me Mr. Navasky did a quite honorable and responsible job of seeking for news and held down to an uncommon degree the direct quotations. I think to the degree he could be centered on news and be paraphrased. There is only one four, five or six line thing where he really directly quotes. I think it's on how Mr. Ford thinks Mr. Nixon looks, which is almost impossible to paraphrase. There you have to have almost the exact words. It seemed to me he was quite scrupulous in trying not to offend

the book but look for news. I think he did that very well.

Q. Mr. Halberstam, if you had obtained the manuscript of the Ford book and had decided to write a news story with respect to it, would it have affected your judgment as to whether to write the story if you had known that Time Magazine was going to publish excerpts from the book in the order of two weeks later?

A No, it wouldn't have.

Q Why is that?

A I consider it a state document. I mean I think it's an interesting thing here. We have a book [411] and the book should be respected. I would be on the other side in this trial if Mr. Navasky had quoted a thousand

pages -- excuse me, a thousand words of the book, and just run this, and taken Mr. Ford's book. But it's also news. As I say again it's a state document about those days as the highest public official when in fact Mr. Ford was paid for by public funds. I mean this is out in the public domain in the most basic and primal way, and, therefore, I have a profound sense it is in the public domain in terms of it being newsworthy. Not the texture of the book, which I consider to be very different. Excerpts are texture. But news -- and I draw a line, and I think you can draw that line -- news is different. I think Mr. Navasky did this with great integrity. I don't think he stole the book but I think he responded to what was news in the book.

MR. ABRAMS: I have no further questions of Mr. Halberstam, Judge Owen.

MR. ZISSU: I would also ask time for cross examination on this witness, your Honor.

THE COURT: Are you saying, in effect, that we have here a record in which President Ford spent a great number of hours being interviewed to get his words on tape, so that then Mr. Armbrister, who worked [412] with him on this could put them in dramatic form and order and edit accordingly and then give them back to him for the President's own editing, and of course you know the thousands of hours, I am sure, that go into the creation of a book. Right?

THE WITNESS: Yes.

THE COURT: Are you saying that even though these are events that are state events, the President is not to have copyright protection for the hours of work he has put into this to get it down in a form where it can be read? I get a little sense that having put this out that it should really become in the public domain by its mere publication.

THE WITNESS: I think it's in the public domain, your Honor, as news. I don't think it's in the public domain as texture. I think that -- and I think this is really a very considerable thing, and I do write books, and therefore it's something I think about a lot. When I did "The Best And The Brightest," for example, which I worked on for four years, and I did all my own leg work,

and I saw four or five hundred people, there were a number of news stories, major news stories in that. For example, the fact that the U.S. highest executive made the decision to send combat troops to Vietnam without [413] finely defined roles, missions and troop levels, and comparably the fact Mr. Johnson and Mr. McNamara in January of 1966 lied to their own council of economic advisors having told the -- having been told by Mr. McNamara and General Westmoreland that it would be a large war, that it would go from 200 to 400 to maybe 600,000 troops when the council of economic advisors came to them they said, no, it's a small war, and as such we got out of that the inflation which still troubles us. That

is a news story, and I would feel that the texture of my book, the portraits of Mr. McNamara, the portraits of President Johnson, the reportage, that texture is mine, but news stories which are important to the public domain are in the public domain and I cannot protect those, nor have the right to protect those. If the New York Times runs a story they had every right to do that, and every reason to do it.

THE COURT: How do you separate between what you call your reportage and the news story?

THE WITNESS: I think news story is news. It's something paramount. That is not -- a book is a very complicated thing.

THE COURT: You are not focusing on what I am talking about. [414]

THE WITNESS: Excuse me.

THE COURT: What I am talking about is if you quote your book verbatim on an item that you concede for these purposes is news, is that fair or is the person who is taking the news story required to paraphrase you or is he required to shorten up your language, or what?

A Well, I think there is some common sense rule in here. I don't know. I don't think it's a great problem. Say The New York Times had decided to run a story on this very important moment where they decided to send combat troops in but they really had not defined roles, missions, and troop levels. It's astonishing. In other words, was it 200,000, 300,000, or we will only go to 400,000? Whatever it

was, they had not defined it. I would think if the New York Times wrote a story based on that, that they would have the right to quote from up to three or 400 words directly from my manuscript, yes. It may be as they began to go above that they would be beginning to infringe upon my book. But again it's a gray area, and they would have been right to know that that was news.

If they had run 600 words of my portrait of Robert McNamara, with the anecdotes and the writing that was mine, then I would have really felt raped [415] and I would be angry, and that's what I mean by the difference between news and texture. One is in the public domain an one is mine.

THE COURT: Anything else?

MR. ABRAMS: No. Thank you.

THE COURT: Thank you very much. You are excused for now.

MR. ZISSU: Your Honor, will you inform Mr. Halberstam he may be called back.

* * *

[Direct Examination of Victor Navasky] [435]

Q Did a time come when you received a copy of the manuscript of a book entitled "A Time To Heal" by Gerald Ford?

A Yes.

Q Approximately when was that?

A Sometime, I guess, in March of 1979. [436]

Q Did you request the copy?

A No.

Q Did you pay for it?

A No.

Q Had you previous to receiving the copy made any attempt to purchase any rights related to the book "A Time To Heal"?

A No.

Q Had you attempted specifically to purchase first serialization rights to the book?

A No.

Q Does The Nation ever acquire first serialization rights?

A Yes, but again we don't and can't get into competitive bidding situations because of our financial situation. But we will -- first of all, publishers will submit manuscripts to us that they think are appropriate to the magazine, but on our rate of pay we pay

less, for example, for first serialization rights than we will for an original article, so that we would maybe offer a hundred for first serial rights for something that we thought would be of special interest to us. So we are not part of auctions and it's not part, an active part of the magazine. We prefer to publish original material. [437]

Q Did you understand at the time you were given a copy of the manuscript of "A Time To Heal" that the person who gave it to you was authorized to do so?

A No. I understood that the person was giving it to us in a kind of spirit of -- as that person put it, a whistle-blowing spirit.

Q But you understood the person was not authorized to give it to you, is that correct?

A That's correct.

Q What agreement, if any, did you reach with the person who gave it to you?

A The only agreement I reached with the person who gave it to me was that I would preserve that person's confidentiality.

Q What did you do after you received a copy of the manuscript?

A I took it home and read it.

Q Did you make any notes with respect to it?

A Yes. Now, I should say this happened a long time ago and we had processed -- I have processed over a thousand manuscripts since then. And it wasn't until the lawsuit that I really began to focus in and try to reconstruct

everything I did. And part of my [438] way of reconstructing it was to gather everything together in the office and look at it, and I remember taking notes, and I did that, yes.

Q Are the notes that you took the document which has been marked in this case as Plaintiffs' Exhibit 20, the original of which I hand you now?

A Yes, I think so.

Q Another document introduced in evidence yesterday was a document marked as Plaintiffs' Exhibit 18. Can you tell the Court what that document is?

A Well, this is an early draft of the article. It may be the only first draft, and I may have gone right from that to the final or it may be an intermediate draft. But it is a draft

that I wrote of the article that eventually appeared in The Nation.

Q Another document introduced in evidence yesterday was marked as Plaintiffs' Exhibit 19, which is entitled "Note on Structure." Could you tell us what that document is?

A Yes. This is a four-point outline to myself, and I sometimes will, when dealing with a large body of material, after looking at it quickly, write a preliminary outline for the article that I am going to write, and this is my preliminary outline to myself [439] about how to think about it.

Q Is this the only outline that you found when you looked through your files for any documents?

A Yes, it is.

Q Can you tell us what you did after you read the book?

A I took notes from it -- I guess I scanned it very quickly. I then read it more carefully, took notes from it, and then I attempted to write up a story that we could use in the magazine on it. It seemed to me that it was -- that what had been dropped in our lap was hot news and that I had an opportunity to get out a very important news story quickly; the kind of story what rarely comes to a magazine like The Nation. And what I really don't remember is whether this happened over a two-day period or a one-day period, but I spent maybe a half dozen hours or six to ten hours reading it and maybe another few hours, six to ten hours

writing it. I remember staying up very late and I did a draft of the article.

* * *

[440]

Q Why did you believe that the manuscript could be the basis of a news story?

A Well, I didn't and don't pretend to be a Watergate scholar, and because this happened over the weekend, I didn't have the benefit of a copy of the Hungate hearings in which to compare what happened here with what happened there. I may have consulted Tony Lukas' book "Nightmare," which I consider the authoritative book on the case and I have had discussions with him about it, and I had a copy handy. But I also considered myself a more serious and

informed observer of Watergate events than the average citizen or even the average reader of The New York Times. I had written a great deal about the criminal justice system, I had done articles for The New York Times Magazine about every attorney general since Robert Kennedy, so I felt confident that I had a general impression of what was generally known, and I was astonished by some of what I read in Ford's book. I was not aware at the time, I must say honestly, that the Haig transaction had taken place and that Ford had called Haig after and read him the statement that he read him, and I certainly hadn't known about his conversations with Jack Marsh or with Bryce Harlow, or with Bob Hartmann. But it was the Haig thing

that leapt out at me and so [441] it seemed to me that there was major news there, and that the news was not just they had this conversation and not just that here it was with Ford authenticating it, but that I frankly didn't accept it -- what I regarded as the veneer of innocence on that conversation that Ford had so successfully put on it.

I had questions about that. I didn't pretend to know any more than President Ford told me as reader in his memoir, but it seemed to me that that set of facts: conversations with Haig, five options being outlined, the fifth option being if you will agree to pardon Mr. Nixon perhaps he will agree to resign, and Ford asking him, "Is it possible to pardon an individual before

he's been indicted"; Haig having checked out in advance with a White House attorney that it was possible, Ford then not saying anything to anybody about it, and the next day when it came up in a conversation with an aide, one of them telling it was a time bomb, another one saying it could cause trouble, and a third saying something else, that it was a real mistake, that silence implies assent, and Ford then reading a pro forma statement, it seemed to me that those facts could either be evidence, as Ford said they were, of his totally appropriate behavior, or they could be evidence of something more sinister. [442]

That's where the policy relevance and newsworthiness leaped out at me. So I sat down to write a story about that.

When I did, I also went back to my notes, and there were a half dozen other things in the book that seemed to me newsworthy, so I put them in my story. And that is what I did.

Q What do you mean when you say policy relevance?

A Well, if I had wanted to write a news story off of the Ford book and if I, for example, had been employed at the time by The New York Times as a reporter and the book had come to me, whether before or after publication, and my assignment was to write what is news in this book, I would have written a different story, and I would have included, for example, the fact that Ford reports that Betty was jealous that he kissed some startlet. I would have included

the very moving material about her operation. I would have included some tidbits about his daughter Susan and her relationship with the White House photographer. I would have included some material on his decision to go public with and appear before the congressional committee, which was investigating the circumstances of the pardon. That was a major decision.

But again, it seemed to me of greater historical than immediate news significance. That was [443] a judgment I made. But if I had been writing just bing, bing, bing, not policy relevant, but a news story for a general interest publication, I would have included those materials in addition to the materials that I included, and I guess having been

instructed by Mr. Friendly, I would have included the Glomar Explorer and other things like that.

Q When you say that you included material that was policy oriented as opposed to the other kind of material you outlined for us, what kind of policy are you talking about, when you say policy oriented?

A Well, I would say policy relevant. Social policy and public policy is what I am talking about. Things that affect the state of the country and that have some importance beyond historical or reader curiosity.

Q Why did you believe that the material that you published on the pardon had importance beyond historical or reader curiosity?

A Well, there is a two-fold answer. First, at that point, since President Ford was a live possibility as a candidate for President or Vice President in that year, it seemed to me all news about him had what I would call policy relevance. But my particular reason for picking on the pardon news was that if the questions [444] that that manuscript put into my mind about a possible obstruction of justice were really -- you know, I may have been wrong, but I thought they were real questions -- if they were real questions, then they would have raised troubling -- they would have provided a troubling agenda for President Ford and Alexander Haig, who was another possible presidential candidate at that time, a

troubling agenda of questions for them at news conferences throughout that preconvention period. And it seemed to me that that was a real contribution that it had fallen into The Nation's hands to make.

Q Can you tell us in general how you decided what material to quote in your article, and what not?

A Well, in general, I guess first, I was conscious that this was a manuscript and that I wanted to quote that which was -- I considered newsworthy. But I also did not want to take Ford's literary contribution away from him, unless I considered that genuine news that the public had a right to know and that was important to the story. So that whenever I saw what I regarded as a

public document in that manuscript, for example, the memorandum from Ruth to Jaworski, or when Ford said I read this to Haig over the phone, I assumed it was [445] a document, turned out not to be, but I felt those things I could quote without any problem at all. Where there were what seemed to me news critical conversations that related to the possible, what I regarded as possible obstruction of justice, but related to the pardon, for example, the remarks of Harlow, Marsh, and of Hartmann, it seemed to me essential that I quote their conversations verbatim. And again, my belief was that they were nobody's property, they were just their conversations and that I had the right to quote them. Then there were times

where Ford was describing his own mental state and in those cases I did not generally feel free to quote but except in some cases I thought it essential.

For example, when he said he thought it was an act of cowardice for Rockefeller to withdraw from Vice Presidental contention, it seemed to me the word cowardice, it was very important that I make clear it was his word, so I put those in quotes. Then there were situations such as his visit to Nixon in Nixon's bedroom when he was suffering from his phlebitis, where he described Nixon as being on the brink of death, in his own words, and I found it there impossible to distinguish his description from his words. I couldn't paraphrase it in a way that I [446] was

comfortable with, and it seemed to me that the occasion of the only two living former presidents of the United States at that time confronting each other, where one of them was close to death, if ever there is news, that was it, so it was okay for me to put that paragraph in.

Then, in other cases, I'd have to look to tell you, well, I used this phrase and not that phrase. There is one other phrase I remember putting in that I felt odd about when putting it in, but then I will tell you why I left it in later, after we showed it to our lawyer, and that is where I quoted Ford as saying that he had learned at the Yale law school that public policy sometimes takes precedence over law, and I

knew that since having gone through that institution and since that wasn't my idea of what they taught me there, it was news that the former President of the United States might be misapplying a principle, of Myres MacDougal who taught that course, as a reason for pardoning Richard Nixon. So that was a personal decision. [447]

Q Let me put before you, Mr. Navasky, Plaintiffs' Exhibit 10, which is the article, and just ask you about a few of the other quotations which you have not mentioned. On one page toward the bottom of the page, the term "smoking gun" is quoted. Why is that?

A Well, that seemed to me almost a term of art in the Watergate discussions. Also, there is a kind of

negative reason for putting that in quotes, and that is that it has come to be almost a cliche, and I try to stay away from cliches in the process of writing the magazine. So it was just to kind of set it off, to indicate that it wasn't our phrase.

Q The next page before, it says, "Ford was deeply hurt by Haig's revelation," and then there is a sentence which starts, "Over the past several months, Nixon had repeatedly assured me he was not involved in Watergate." The quotation ends a little bit later. Why did you quote that?

A I am going to answer all your questions and everybody else's, but as I said earlier, I can give why I quoted this and why I quoted that. It seems to

me ultimately what happens when you write a story like this is, you are creating something that has its own integrity and you frequently put one sentence in to make another sentence [448] work. And I was not -- maybe I should step back now and tell you the other article I thought of writing off of the manuscript at the time. It certainly might explain why I put this in.

Q Why don't you go back to that.

A It seemed to me there were two possible pieces I could write off of this book in the short time frame I felt I had to do it. One was the story that appeared, which was essentially this news story with its implicit question about whether there was an impropriety. The second was a much more overt

editorializing story, where I made the charge that there was a possible obstruction of justice and called for, in a kind of classic old fashioned incendiary journalistic fashion, called for an investigation of this based on what I thought was the new evidence.

I didn't do that, the second, for two reasons. One was I wasn't sure which of what I saw in the manuscript was new evidence at that point. As it turned out, some of it was new and some of it was not new. And secondly, it seemed to me that if we were going to achieve our goal of not only reporting this event, but making news out of our report, which we very much wanted to do with our story so that we could raise the questions that I have described

before with the press, with our readers, with the public at large, if we were going to achieve that [449] goal, our best chance of having this material taken as fact was outside the context of a piece which made the argument directly in an editorializing way.

So I wrote as fairly as I could and as objectively as I could, I wrote a piece which, nevertheless, was organized to raise the questions I wanted to raise, rather than to put the construction on the same set of facts that Mr. Ford and Mr. Armbrister put on them that they wanted to do. So in that context it was important to me to have in those episodes that reflected the seriousness, from Ford's own perspective, with which he approached these issues. And so this

quotation "Over the last several months, Nixon had repeatedly assured me he was not involved in Watergate," seemed to me -- first this was news because it was evidence of a deception of one president by another president, and secondly, it begins to tell you something about what was going on in Ford's mind as to why he pardoned Nixon, which I think is part of the continuing national inquiry, because it relates to these critical issues of what are the criteria for pardon at that level in this unique historical event with its unique reverberations.

Q Let me go on to the next paragraph, Mr. Navasky, indeed, the next two paragraphs, the one which starts, [450] "He could ride it out or he could resign," and the second of which winds

up with a quotation from General Haig. Could you tell us, as best you recollect, how you decided what to quote and what not to, as you wrote that?

A Sure. I put in quotes the words "ride it out." I felt it's important for me to say, hey, this is not The Nation characterizing this. We want you, the reader, to know this is the way they characterized this. So that gives credibility to the narrative.

Where I put in "because of his references to the pardon authority I did ask Haig about the extent of a president's pardon power," and then the next paragraph begins, "'It is my understanding from a White House lawyer', Haig replied, 'that a President does have authority to grant a pardon before

criminal action has been taken against an individual'"; it seemed to me I found it difficult to find a credible explanation for that conversation that did not raise the possibility -- not the probability but the possibility that there was a deal being made there or cooked up there. And so I wanted to, it seemed to me it was therefore necessary to put that in their words, rather than in anybody else's words, because that was the nub [451] of the obstruction, the impropriety, whatever one wants to call it, if there was one. So that's why I put that in quotations.

THE COURT: Can I ask you why you put in quotes the prior sentence, "Because of references to the pardon authority, I did ask Haig about the

extent of a president's pardoning power"? That is not in quotes in the book or the typescript. And I noticed that earlier.

Why did you put that in quotations?

THE WITNESS: If he said it, unless you are saying I misquoted President Ford, this is a quotation from the book, because "I did ask Haig about the extent of a President's pardoning power" is Ford speaking as a narrator. So I had to put it in quotation marks to make clear that it was Ford as author saying it. And perhaps it could have been --

THE COURT: As distinguished from your paraphrasing?

THE WITNESS: As distinguished from my paraphrasing it. I'd have to go back to the book to look at it, but that is the only place -- since he doesn't give

the quote where he says, here's what I said to Haig, "Is there a" -- you know, that would have been the alternative [452] way of doing it.

THE COURT: You did the same thing when you say, "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate." This is not in quotes in the book either.

THE WITNESS: I am quoting the book.

THE COURT: The quote is not quite accurate, I observed. You changed one word. You didn't change the sense of it at all, but you transposed a word here.

Do you know why you used a quotation at that point?

THE WITNESS: Yes. It seemed to me, and I can also explain the unfortunate, there are a number of inaccuracies that

crept in here. But first, to answer the question of quotes, I was quoting Ford as narrator, and I could have said there, I guess, "Over the past several months Nixon had repeatedly assured Ford he was not involved in Watergate," but it seemed to me it was a much more powerful statement for the reader and authenticated the news value of it so that someone on an AP desk deciding whether or not this is real, doesn't have to say, can I trust the Nation to paraphrase properly, the Nation, which has a political perspective which may cause them to be suspicious of these fellows, can I trust them to [453] paraphrase properly.

So those few places where it seemed to me there should be no dispute about

it, I quoted directly his language from the book. He didn't have quotes in the book because the book is his, and when I am quoting from it, maybe I should each time have said, he said in "A Time to Heal", et cetera. If there are inaccuracies that you suggest, another one is that Jackson, Mississippi is transposed to Jackson, Michigan. The way that happened I have to assume is that because I was working eventually from my notes after I finished taking notes, I returned the manuscript and we didn't have anything to check the notes against anymore. Regrettably the error that you point out got in there, and there are one or two others I'm sure that have crept in.

THE COURT: The errors I think are

of little if any concern. My question isto the use of the quotation marks for those that were obviously not quotations.

THE WITNESS: They are quotations from author Ford. Ford as narrator.

THE COURT: Rather than something Ford said?

THE WITNESS: Rather than something he said, right. That is the purpose of those quotations. I hope the article doesn't mislead the reader into thinking that [454] they are what he said.

Q You have mentioned a few of these already and I won't ask you to go through them again, Mr. Navasky. The last paragraph on the left column on 363 about the

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consultations with Mr. St. Clair, Mr. Marsh, Mr. Harlow, contain quotations around the words "time bomb" and "could cause a lot of trouble" and in the preceding paragraph, "silence implies assent." Why did you quote those?

A If one looks at the conversation with Haig, the conversation with those three peopie and the telephone call to Haig as the three elements of a possible deal, then it would seem to me in each case very important within the limits of both the space of the magazine and what the law would permit, to have these people speak in their own words. Not here in President Ford's word, in their own words, about what was happening at the time it happened.

Q Is that the reason for most

quotations of people other than President Ford?

A Yes, it is. It might be the reason for all of them. I'd have to go and look at each one.

* * *

[455]

Q . . . On 363 under the quotation from the Ruth memorandum which you have already talked about, there is a paragraph which says that Ford decided that the court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else." Do you recall why you quoted that particular line?

A Well, I'd say, you know,

sitting here now, I'd say I could have paraphrased those lines, but again, it was a critical historical decision and it seemed to me, even though Ford didn't say it conversationally at the time, to that extent it was desirable to say this in his words, because of the absolute certainty with which he expressed himself. If there had been a vague general statement, I'd say, "Ford thought public attention would be difficult to pin down," that would be one thing. But he said "it would be virtually impossible for me to direct public attention on anything else," it seemed to me virtually impossible for me to communicate that in any way other than by quoting him directly, I guess. [456]

Q Then at the bottom of page 363

in the right column in the discussion of the desire on the part of the White House under President Ford for former President Nixon to make a full confession on the occasion of his pardon the last line reads,

> "But as Ford reports Miller's response, Nixon was not likely to yield. 'His few meetings with his client had shown him that the former president's ability to discuss Watergate objectively was almost nonexistent.'"

Why did you quote that?

A One of the themes that runs through that part of "A Time to Heal" that it seemed to me important to capture was this portrait of President Nixon as being out of touch with reality. While I had read that charge from people like Woodward and Bernstein and critics of President Nixon before, I had

never seen it from someone who obviously respected and was in sympathy with him. And again because of The Nation's reputation, which is deserved, as a progressive journal, it seemed to me important that we make as clear as possible that this comes from President Ford so that readers could accept it as his characterization and not the characterization of someone who might have a political disagreement with President Nixon or President Ford. This was his own way of saying [457] it. . . .

Q In the next paragraph, which starts "The statement they really wanted was never forthcoming," there is a statement attributed to Ron Zeigler and a part of a statement in response to it. Why did you put those in quotations?

A Well, I put in "'Let's get one thing straight immediately,'" Zeigler said. "'President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not.'" It seemed to me that was, first of all, a statement by a public official, an arrogant statement that I was not aware had previously surfaced before in that way, and it was newsworthy. But also it was, again, important to characterize this tension that was going on between these two camps in this vital historical moment. And when Ford writes about this as a narrator, it was the definitive quality of that statement that made me put it in. I left out a lot of other things Ford said that were interesting to our readers

that I would have liked to put in. If I were excerpting his book, I would have put in when he observed this was a condescending [458] use of his first name by this kind of pipsqueak former press secretary, or press secretary, Ron Zeigler. It was an inappropriate thing to say, and it obviously offended then Vice President Ford. There were a lot of details like that one I might have put in, but I put in what I thought was essential right there.

Q And then in the next paragraph of the discussion between Mr. Ford's aide, Benton Becker, and President Nixon, with respect to President Nixon's admitting that accepting a pardon was an admission of guilt, there are three sentences in the paragraph, the third of

which contained a few words quoted. Do you recall why you did that?

A To me, the passage was uniquely revealing about a very sad moment in history, that President Nixon's desire to talk about the Redskins rather than this decision which more than any other was going to affect his life and perhaps his reputation in history, it seems to me was news with historical resonance and I couldn't think of any way -- if I said out of his own jewelry box, what he ended up giving as a gift, this tie clasp, if I said he gave a gift out of his own jewelry box, that to me says a lot less than saying he gave a gift "out of my [459] own jewelry box." Nixon was saying, "This is what I have to give you. It's my last

set. There is no other like it. I am giving it to you out of my own jewelry box." That to me was a touch that was too good for me not to put in, and it was Nixon's touch, it was the way he spoke and I put it in.

Q You already referred to the next few paragraphs. What about the quotations that are included in the passage with respect to Mr. Kissinger?

* * *

A . . . First of all, these are all conversations that went on between Ford and Kissinger. Kissinger's answer when he said, "I know we'll get along"; Kissinger said, "It's my job to get along with you, not for you to get along with me." That to me is a kind of an affirming piece of evidence as to the

authenticity of this whole description, because you see Kissinger is a quintessential diplomat there and you also get a sense of him lobbying on his own behalf to play a role in the next administration, i.e., in the Ford administration, and it tells as much about how power works at [460] that level as anything of that sort could do. So it seemed to me worth including.

And I might say, as a category, the half dozen addendums that I included to the story about the pardon I wouldn't, if I had been given these half dozen addendums without the pardon story for The Nation, we probably wouldn't have run them. We have a thing that we call it "Item. Item. Item." where we do short takes and we might have run one or

two of them in the item section, but as part of this news story about this particular book coming out with that particular message, it seemed to me that they really add to the whole impact of this story. And also, whether or not I chose to run it, I would have thought I could have run them because they are all newsworthy items.

* * *

THE COURT: Do I understand that if you had not had the pardon story you wouldn't have run any of the balance, is that what you are telling me?

THE WITNESS: Might not, Judge. I have to look at it that way. But I thought there was news in the balance, but it wasn't that important that, so important as to displace other things we might want to do in the [461] magazine.

THE COURT: Go ahead.

Q The quotation of a few sentences from Secretary Kissinger on the right side of the page on page 364 with respect to the decision to run again, in which Secretary Kissinger talks President Ford out of saying that he wouldn't run for reelection, why is that material quoted?

A Well, it seemed to me newsworthy. It had not been said before. But the insight that Kissinger had into the nature of a lame duck presidency was instructive, and so it was newsworthy with a piece of information about how our whole system works. And again it shows Kissinger with this really Machiavellian intelligence, not in the invidious sense of that word, but in the

sense that is used in The Prince that he really is advising somebody on how to use power at the most sophisticated level.

Q The next section, Mr. Navasky, has been commented on, as you have heard in court, by a few people. Tell me, first, why you included anything about what Mr. Kennerly did and about the Mayaguez incident.

A Well, you know another definition of news which came up earlier is man bites dog, and it seemed to me this incident met that definition. That usually a photographer is the fly on the wall and he may be able [462] to eavesdrop on these great decisions of State, but in this case the fly on the wall helped make policy and had an

insight that none of the great policymakers had. So I wouldn't agree with some of the earlier people who said I didn't intend to suggest that that's the way policy was made during this administration as a matter of course, yet the fact it can be made that way is a marvelous piece of news to the American people, to know that you and I could have an impact if only we had access. And I also think that Kennerly was less insulated than the other characters in that drama just because they only tend to be able to go to occasions of State whereas he had access to both the corridors of power. . . .

* * *

[463]

Q You may have dealt with this already in passing but I will ask you: The material with respect to President Nixon's character by President Ford. First, why did you include any quotations there?

A Well, again, you are dealing with this delicate issue of reputation and character, and I couldn't see a way of being faithful to that material without quoting this one historical character, this one president about another president. In addition, what was news to me was that Ford, who was portrayed in the press as a bumbling, affable fellow, had insight into President Nixon, and insight into his pride and his attitude towards weakness in others

contributing to his vision of his perception of right and wrong. It seemed to me really important to get out there and to isolate, and useful to do that. And as the final quote, which was the encapsulating quote of that theme in this piece, Nixon was out of touch with reality. [464]

Q Who did you talk to in the Nation before publishing the article?

A As I remember, I talked to three people at the magazine itself. I talked to Elizabeth Pochoda -- I talked to more than that. I talked to Elizabeth Pochoda, who was our literary editor, I talked to Richard Lingeman, who is our executive editor, and who edited the story that I wrote. I talked to our publisher and told him that we have this

hot news story, and I talked to Karen Wilcox, who was my assistant, and asked her to call Harper & Row to find out what serialization plans, publishing plans, there were, what the print order would be, when the book was coming out, all the normal things one would want to put into a news story about an event like the presidential memoirs.

Q Why would you want to put those matters into the news story?

A It goes back to the two different new stories one could write. If I were writing a story charging overtly an obstruction of justice, mobilizing the information in the document, comparing it with other accounts of Watergate, the Watergate pardon situation, and editorializing on

it, then the book itself there might have been a footnote that Mr. Ford admits this [465] in his forthcoming book. I wouldn't have put in these other stories and I wouldn't have put in anything about publication of the book. But in this case this was it seemed to me, a classic kind of news story about a major publishing -- what might have been a major publishing event, that here was a book coming out by a former President who was a candidate to be President again, or perhaps Vice President, and it's important to know how many copies there were going to be made available, it's important to know -- the more they had planned the better the peg for the story is. That's just a convention of

journalism. So that's why I wanted to find out that and why I put it in.

Q What information did you know at the time you first got the manuscript and began to work on it about first serialization rights?

A I had no information.

Q What information did you know at the time the article was sent to be published about first serialization rights?

A At the time our article was --

Q At the time the article came out.

A Everything we knew I put in the lead paragraph. [466]

Q Did the fact that Time had first serialization rights to the Ford

memoirs affect your judgment about whether to publish the article?

A It didn't negatively affect it at all, and I didn't know what they intended to publish. That Time and Reader's Digest intended to publish something, they could have taken another section as well. The fact that they both apparently intended to use the pardon and Haig's story confirmed later on my judgment it was news.

Q My question was what you knew then?

A I didn't know anything about it other than there would be serialization. I didn't know what it would be. To this day I must say I don't know what Time would have been. I know the representations that were made. I read

the Reader's Digest and they began with the same thing we began with.

Q You said you wanted to act quickly after you received the manuscript. Why was that?

A Because I thought it was hot news. I mean, first of all, this was not one of those investigative stories that we set out after and spent eight months on. It was something that was dropped into our collective lap, as it were, and in all humility I said if it happened [467] to us I felt it might be happening to a lot of other people, and that's part of the news business, you know. I go home by way of these New York Times trucks and I frequently see the New York Post truck racing with the Times truck to get to the news stand. The Post's whole

business against the Daily News is to get on the stands an hour beforehand. And so there is that part of the news business.

Secondly, and more importantly I guess I would say, it seemed to me that the only way we could raise the questions that I thought were important, which were the questions of whether there was the impropriety that that I had described and that I think is reflected in the conversations that are held here, was to take those facts out of the context that President Ford and Mr. Armbrister put them in, which was a context of not only innocence but probity and correctness, and let those facts speak for themselves, which I regarded as less than correct. I regarded those facts as raising troubling questions.

And if we had done that after the book came out we would have raised those questions for that sub-set of our readers who read book reviews or book comment, but we wouldn't have been able to have the chance [468] at making the news that would raise these questions in advance of publication so that the book might be read through the screen of the questions that we asked.

And so it then was important for us to do it sooner rather than later, and my training was if you have the news you go with it as fast as you can. We have lost stories because we have been too slow on them and they will appear on the front page of the New York Times, and that is always a lesson to us when that happens.

Q I apparently skipped one paragraph, Mr. Navasky, in the article I meant to ask you about. The material on John Connally on the right column at page 364 contains a few quotations. Can you tell us --

A Again, that's a combination of insight into what plans Nixon had, Ford is having, it's a sign of Ford's own limited ambition in this area, that he had first agreed to Connally, and Connally himself was a presidential candidate at this time. I don't remember now whether he had literally announced yet or not, but he was very much in the running and thought by many to be a favorite, and it seemed to me appropriate to put in there an item about him.

Q But did you consult counsel at any point [469] prior to the publication of the Nation article?

A Yes. Yes, I did.

Q When was that in the context of what you have described to us?

A Again, it happened long enough ago that I can't remember precisely, but I remember at least one conversation and probably had more than that, probably I had two or three, because we talk all the time about a whole set of different things, but I called him specifically about this manuscript.

Q Who is your counsel?

A Actually, I remember two conversations.

Q I should have asked earlier. Who is the lawyer you spoke to?

A The Nation's counsel. Landy Strongin. He is a partner with the firm Dornbush, Mensch & Mandelstam.

Q Why don't you proceed to describe your conversations with him?

A As best as I can remember them, when I told him that this manuscript had come to us he raised a whole set of questions about how we got it, and he wanted to make sure that it hadn't been stolen. I assured him that we hadn't stolen it, and the person who [470] gave it to us told me he hadn't or she hadn't stolen it, that the person who gave it to us was someone known to me and whom I respected and that we had authenticated that it was a real document and not a forgery. And he asked then to see galleys, and so when the manuscript that I wrote went into galleys he reviewed the galleys and then we had a conversation about the galleys

the result of which was that he gave me in effect what I interpreted as a legal green light to publish.

THE COURT: Did you discuss with him any copyright questions?

THE WITNESS: Yes, we did discuss copyright. I can't give you precise details, but basically what he said was that this was -- this is -- well, here's what he said first. He said two things. He described to me the fair use doctrine, and he said that this could be a close case, but in his judgment we would, if it went to court, we would prevail. But, he said, you are a poverty-stricken magazine, and you may not want to risk being taken to court because it could bankrupt your magazine. However, all things considered, I think you would be safe to publish it.

* * *

[472]

CROSS-EXAMINATION

BY MR. ZISSU:

Q Mr. Navasky, how many manuscripts have you, to use your term, processed since March of 1979 when you were given, without permission, the Ford manuscript in a whistle-blowing spirit?

A Let's see. I would say we get about -- I'm not now going to count what's known as the slush pile where I will see maybe fifteen manuscripts a day that we turn down. I will say that I read them and sometimes make comments on them and pass them on to a colleague, so if one included those it would be in the -- maybe close to 10,000. But if we don't include those and we just say

every week we have about five articles in the front of the book, maybe four or five editorials, I also occasionally read back-of-the-book articles that are in manuscript form, usually I read them in galley form, so 10 times 47 would be 470 a year, you can figure out.

Q How many of those are for books?

A Well, The Nation has an autonomous, relatively autonomous back-of-the-book section, so I don't routinely read book reviews until they are in galley.

Q No, not book reviews. How many book [473] manuscripts have you gotten?

A I would say we get maybe a couple a week.

Q And how many of those have you received since you have been editor of The Nation where you knew you were receiving them without the permission of either the author or the publisher?

A Two.

Q So this is a rare event?

A Yes.

Q If you had known about the Hungate testimony of President Ford would, as you term it, the Haig thing, have leaped out at you?

A Well, I knew about the Hungate testimony. I didn't have a copy of it available to check, but it would have because -- I think it would have. You know, it's a hypothetical question. But I think it would have because it had not penetrated, I think, the American psyche

at the time because that was a different context, and at different times we have different preoccupations. And my reason for thinking that partly is that the Reader's Digest did exactly the same thing we did, they made that their lead, and partly that having published the story, it was picked up by newspapers. [474]

Q I asked you, if you had been aware at the time would it have leaped out at you in the same way? I didn't ask you about any subsequent event.

A It's a hypothetical. I can't know any better than I tried to tell you.

Q How many words in your article are quoted from the Ford manuscript, do you know how many there are?

A Well, I distinguish the words

that his Honor was asking me about that are Ford's own words, and conversations and documents. So if you eliminate the conversations and documents, I would say very few.

Q How about with the conversations and documents?

A The conversations and documents, I can't give you a precise count, but I would say it was in the under 500 area.

Q Not over 600?

A I don't want to be held to this, because I have not personally done that count. Because my own assumption -- anyway, I haven't personally done that count.

Q Do you know how many are closely paraphrased?

A In writing about a book --

Q Do you know how many are closely paraphrased? [475]

A I'm not sure I know what you mean by closely paraphrased.

Q If I am not incorrect, the brief that has been filed in your behalf in this court uses the word closely paraphrased.

A Yes.

Q Closely paraphrased is closer to quoting than far paraphrase. You are an editor. I want to know if you know how many are closely paraphrased. If you don't know, you don't know.

A I can't answer that question the way you have asked it, no.

Q When you telephoned Harper and Row to find out when the book is going

to be published and when the serialization is going to be run, did you tell them The Nation already had access to the Ford manuscript?

MR. ABRAMS: I object to the form of the question, your Honor. The witness has not testified that he personally telephoned.

THE COURT: All right. I will sustain that. Rephrase it.

Q Do you know whether, I think it was Miss Wilcox told Harper and Row that?

A As far as I know, she did not tell them [476] that. It is practice --

Q I really --

THE COURT: That is the answer. Go ahead.

Q At the time that you published

The Nation article did it not occur to you that Time Magazine might find interesting the same portions of the Ford manuscript that you yourself found interesting?

A That they would think it was as newsworthy as we thought it was?

Q No. I mean --

THE COURT: As interesting.

Q If you put it in your own words.

A Yes.

Q At the time that your article -- when I say your article, I mean the April 7, 1979 article in The Nation -- was published were you aware of the details of the Hungate testimony given by President Ford?

A I am not a student of the

Hungate testimony in the sense that Mr. Reeves is, but I was generally aware of the Hungate testimony, yes. But not of the details sentence by sentence, and I did not -- I was not specifically aware of the Haig conversation -- telephone call sequence.

Q At page 39 of your trial memorandum submitted [477] on behalf of the defendants, it states that The Nation merely published -- on the bottom of the page -- merely published news that had come into its possession in a fashion indistinguishable from that of most news that arrives unsolicited at a magazine or a newspaper. Is it your testimony that the manner in which you received this manuscript is in fact the way that most news arrives unsolicited at the magazine or newspaper?

A We didn't publish the manuscript. We published the news --

Q I --

A We published an article about the news --

Q That is not the question.

THE COURT: That is not what he is asking you.

A As a question that -- could you ask it again? I'm sorry.

Q Yes. Is it your testimony that the manner in which the Ford manuscript arrived, or as you put it, was dropped into your lap, came to you in a fashion indistinguishable from that of most news which arrives unsolicited at a magazine or newspaper?

A No. [478]

Q Mr. Navasky, Mr. Friendly

testified yesterday that there were certain things he would do with respect to an unpublished manuscript, such as President Ford's, before publishing a story such as your own article. One of these was to check on the source to make sure that the document was what it purported to be. The other he said I might simply rely on a trusted source such as this. I believe you testified earlier that when you spoke with your lawyer, you told your lawyer that you had received the manuscript from a trusted source, is that correct?

A I also said that we had validated it, yes.

Q How did you validate it?

A I validated it through questions that I asked our source and the

source's answers validated for me that it was authentic.

Q What were the questions?

A I asked how he obtained it, and I asked questions about the history of dealings related to it that satisfied me that it was authentic. I don't want to breach my promise of confidentiality, which is why I am hesitating to go into further detail.

Q Do you believe that answering those questions [479] would reveal the identity of the source? Is that the problem?

A The problem is to go into detail about it might do that. But I'm sure there is a way, a language that we can figure out where I can answer your questions satisfactorily to you.

Q You want to try?

A Yes.

Q Since you know more about it than I do.

A Yes. Well, there are a number of ways that I validated it. First of all, I read it. And secondly, I asked the source how it was obtained; and thirdly, based on my judgment about the source's reliability, the statement of the source as to how it was obtained, my reading of it, I accepted the fact that it was bonafide.

Q With respect to the reliability of the source, without revealing the identity of the source, was it somebody you knew?

A Yes.

Q A long time or --

A Yes.

Q Mr. Navasky, is it fair to say that the purpose of your inclusion in your article of the block quote describing Mr. Nixon's appearance in a hospital [480] was done for the purpose of providing a positive aspect of Mr. Ford and to give balance to your article?

A That is not the only purpose at all of including it. The main purpose was that it was a dramatic statement, the information in which seemed to me indistinguishable from the language. And it seemed to me highly newsworthy that one President of the United States thought the only other living former president was perhaps, looked to be on his death bed.

Q But was it included, as Mr. Friendly, Professor Friendly interpreted yesterday, to give balance to the article?

A As I stated earlier, I -- and I will do with you what I did with Mr. Abrams, I'll be happy to go over each statement. The whole article, when you write something like this, without pretending that it's any great work of art, it does have integrity of its own and an organic life of its own. And one includes and excludes for both literary balance and for credibility, and so to me this statement, while that was not my motive in putting it in, this statement is a tribute to President Ford, but that wasn't my motive for putting it in.

Q Wasn't this part of your theme

or your purpose in isolating certain events, to remove, as you [481] termed it, the veneer of innocence of events relating to the pardon? Wasn't that your motivation?

A My motivation was to let the facts speak for themselves. As I saw them, the facts raised questions about the propriety of the conversations that Jerry -- Vice President Ford had with Alexander Haig and the possibility that there was some kind of deal made. And --

Q Was this part of that effort, to just get to these facts that would remove what you call the veneer?

A The statement about President Nixon by President Ford?

Q Yes.

A No. This was, as I thought I testified to, in addition to the main thrust of the article, which was on the pardon, I also testified -- I also included materials that had independent news value, and that seemed to me appropriate to go into an article about a book that was going to be published. In this case, however, that particular episode, it seems to me, qualifies under both headings, because while President Ford wrote that the reason he pardoned Richard Nixon was not out of a sense of compassion, this particular passage showed that he was a man capable of great compassion, perhaps more [482] than he understood. I didn't make that big a deal of it, but I put it in. It seemed to me a very powerful passage.

Q In your article you state that the Ford manuscript contains significant new detail. What is, if you can do it briefly, the new detail?

A Well, some of it I included here and some of it I don't include here. But, for example, the quotations from all of the aides that Ford spoke with after he spoke to General Haig and before he called him back, are new. The quotation "silence implied assent," the Jack Marsh "time bomb" quotation, and Harlow's "could cause a lot of trouble." I have just quoted tiny fragments of the much more extended treatment that President Ford and Mr. Armbrister give in the book. So you are asking me about the book, not my article, what the significant detail is, I take it. There also

is great new detail included about a lot of subjective material that Ford puts in that I did not use, about what went through his mind in deciding whether or not to appear before the Congress, and there is a lot of detail there about whether it's appropriate for a chief executive -- it was a historic event for a sitting president to actually present himself to the Congress -- and he explains actually why he did [483] that. I didn't use that here, but that is significant new detail in the book.

Q When I ask you the new detail, I mean the new detail that is revealed in the Ford manuscript about which you wrote in your article. You remember when I asked you the questions --

A I see. Now, let's get --

Q If you can be brief, please, and paraphrase.

A Yes. You are quoting from one part of my article that where it says significant detail.

Q Yes.

A Could you tell me where that appears?

Q I think it appears on the first page. It says in the last full paragraph --

A Okay. I say "Ford's account contains significant new detail on negotiations and considerations that surrounded it." I do not purport to give, in my manuscript, all of the significant new detail. That is why I was giving you more than you can find here. But as I say, here it seems to me it is highly

significant that Marsh, Harlow, and Hartmann had those conversations with Ford prior to calling Haig. Because it raises in my mind a question of whether he would have called Haig had he not had those conversations, and it raises in [484] my mind the question of whether the statement that he read to General Haig was a code word statement or meant exactly what it said. And those questions would not be raised from a mere reading of the Hungate testimony, and I think some readers of the Ford memoir --

Q Okay. I want to read to you some portions from your deposition that was given earlier in the case. Starting with page 86 --

A Should I just say one more thing?

Q No, I'd rather have you not.

A Okay.

Q At page 86, line 19, were you asked these questions and did you give these answers:

"Q Look at Defendants' Exhibit 6. There is a statement"

-- I'm sorry -- yes --

"there is a statement on the first page that Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surround it. What was the new detail?
"A Well, I cited last time, I believe the memorandum which I would have to get the article in front of me, which is the thing that struck me" -- this is continuing on 87 "as the most spectacular new detail. It is on page 363. It is Henry Ruth's memorandum. [485] That is number one. Number two would be the statement that Ford read over the phone to General Haig. Number three would be the fact that he hadn't told Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had that original discussion. Those three events struck me in reading the manuscript as things which were new in terms of the news

consciousness of the average reader. Later on we discovered that various things that were in the manuscript that we saw and some of it which we included in the article, maybe not those particular ones, but some of the things we included were in congressional testimony, but they had never been covered as news stories at the time so the public wasn't aware of them. For our purposes, it was the equivalent of new news."

Are you changing that testimony somewhat today?

A I don't mean to. As I said earlier, and as I say there, I learned later that some of the things that I thought were published for the first time had appeared in the Hungate hearings. But they were not part of the general consciousness, they had not been put in the configuration that I could now put them in as a result of reading them in concert with the other [486] material that I used. And as I also

said in my deposition, that I felt my article spoke for itself, and you can tell from its organization what I thought was most newsworthy and what not, because I used what I call a classic inverted pyramid style in writing it. And so you could --

Q Didn't you characterize as the most spectacular new deal, the Ruth memorandum?

A Again, I subsequently discovered that that appeared in the Jaworski book. I wasn't aware of that at the time. But I don't -- I thought it was important.

Q Isn't it a fact that none of these three things that I just read to you were new at the time?

A In context, they were new

because they were isolated by virtue of the conversations with his aides, it seems to me. They were new in the perception that there may have been a deal made, that's all.

Q Mr. Navasky, isn't it a fact that if you had been aware that the Ruth memorandum had been published in 1976 in Mr. Jaworski's book, and that the Ford-Haig August 1, 1974 meeting and the August 2, 1974 telephone conversation between then Vice President Ford and General Haig, isn't it true that if you had known these were disclosed years earlier in Mr. Ford's Hungate testimony [487] before a subcommittee of the House Judiciary Committee, you would not have written this article as the story you wrote it? Isn't that true?

A What is true is that if I had had more time to write this story I might have written it in a different way. But I still think it would have been a policy relevant news story, I would have written it about the Nixon pardon, and the only difference might have been, or a difference might have been, a significant difference might have been that I would have flagged that which was new and that which wasn't. But in the new configuration that I was able to put it, I would have included the same material in the same way. The new material that Ford provides, we now know, his conversations with Hartmann, Harlow and Marsh, it seemed to me highlight the importance of other material which was buried in the Hungate hearings

and in Jaworski's own book. And in fact, -- [488]

THE COURT: No, hang on. Starting with your deposition, you are asked, I take it, why in writing the story you say that the account of the Nixon pardon contains significant new detail which obviously made it newsworthy, right?

THE WITNESS: That's right.

THE COURT: And your deposition, at page 86 and 87, you are asked what was the new detail. You recite that the new detail is one, the Ruth memorandum; two, the statement Ford read over the phone to Haig; and three, the fact he hadn't told Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had the original discussion.

Those are the three new details that you said when questioned on April 3, 1981 were those that you regarded as newsworthy. What Mr. Zissu is saying to you, and I gather you acknowledge that each of those new details was in fact revealed somewhere: The Ruth memorandum in the Jaworski book; the statement to Haig in the Hungate hearings; and the conversation with Haig earlier, also in the Hungate hearings. So we are at the point where in fact none of these revelations are in fact new because they have all been revealed somewhere. They were new, perhaps, [489] to you, but they were not new in the journalistic view, right?

THE WITNESS: That is true, your Honor.

MR. ABRAMS: Your Honor --

THE COURT: That being true, then the question is: If you had -- this is where counsel is trying to get to -- if you had known that these were not new, would you have put this article in the way you put it in anyway?

THE WITNESS: Yes.

THE COURT: And you tell me you would have done it because of the fact that Mr. Ford conferred with three aides before he read the message to General Haig over the telephone, is that what you are saying to me?

THE WITNESS: I'm saying --

THE COURT: That that would have justified the inclusion of the article?

THE WITNESS: I say two things to you, your Honor. First, what they said

to him framed that conversation in a way that it had not previously been framed.

THE COURT: I understand that. But is that new detail making the conversation newsworthy?

THE WITNESS: Well, I would argue that it is, but I would argue something beyond that.

THE COURT: All right. [490]

THE WITNESS: My own experience, my news judgment may be wrong, but my own experience, it's analogous to a story Mr. Halberstam told this morning. I wrote a book called Kennedy Justice. In the book called Kennedy Justice I for the first time named the man that the Justice Department, that the Federal Bureau of Investigation gave as the reason for tapping Martin Luther King's

telephone. When my book came out it had -- maybe 25,000 copies were circulated, got a lot of attention. Nobody wrote a news story about the name of that man. Five years later, the Church Committee did a report about the wiretapping of Martin Luther King's telephone, and where that man's name was supposed to appear, they left it blank, they said for security reasons, we can't reveal the name of this man. I got a call from a reporter on the Washington Post who said, hey, didn't you reveal the name of that man in Kennedy Justice or however long ago this book was published? I said I did. He went to the library, got a copy out. The next day there was a story on the front page of the Washington Post giving the name of that

man, in a new context, saying it can be known, even though the Church Committee said [491] it was classified.

That was a new context that made a document that had appeared earlier in a thing that was a Literary Guild selection, that had wide circulation, that was reported in news media, not in headline news, but appeared here and there, there had been an article by Alan Dershowitz in Commentary Magazine about it, and other people. In other words, even though it had wide circulation, it became front page news five years later. What I am saying is these same documents in that context, in my judgment, and I might have been wrong, but in my judgment, because I was mistaken, you could argue, but I would argue even though if

you -- if I wrote it again now, I might say it a little differently, but I would write essentially the same story, that it is newsworthy for that reason.

Q Let me ask you whether you were asked this question and gave this answer in your deposition. The question is at page 55, starting at line 10:

> "Q So that even if all these documents had been made available or were available to you, you would have still felt justified in writing this story as you did the article?"

There is some colloquy. Then on the next [492] page, 56, is the answer, starting at line 5 going through line 11:

> "A If all the documents had been made available to the public and to all researchers at the time that they were made available to President Ford for publication, I would have written a different story. The story we would have written would have been from the documents. The only way the documents came to our knowledge was through

President Ford's report on them. So we wrote about his report on them."

Did you give that testimony?

A Yes.

Q Mr. Friendly mentioned yesterday that he would check the known record of matters to see what was newsworthy, if presented with a manuscript in the manner that President Ford's manuscript was presented to you. What sources did you consult in coming to your conclusion about what was significant new detail?

A In the circumstances in which I had it, which was basically over a weekend when the sources I would have liked to consult were not available, I consulted the manuscript and reported on the manuscript. I accepted Ford's statements as bona fide, and the way the book was presented in the book -- [493]

Q Other than the manuscript, I just want to ask you what other sources than the manuscript.

A The only other source that I consulted, and as I say, it's long enough ago that I don't want to say for sure that I did, but I probably did, was Anthony Lukas' book, "Nightmare", which in my reading was the definitive book on Watergate up to that time.

Q Isn't it a fact, as you just testified, that you consulted no sources other than the Lukas book, because you reached these conclusions on what was new on the basis of your own general reading and knowledge and also on the basis of your view that if you, who followd this closely, considered something new, then most of your readers would not

be aware of them either? Isn't that true? Isn't that the basis for your conclusion of what was new?

A The basis for my conclusion is that it was, in the context of 1979 with Ford running for President, news of great importance that there had been a possible obstruction of justice in connection with the pardon. And the configuration of not only those documents, but the conversations that I do report in the magazine in conjunction with those documents where one person calls it a "time bomb," another says "silence implies assent," and another says that it "could cause a lot of trouble," that [494] that conjunction made it extremely newsworthy.

Q At page 52 of your deposition,

I want to ask you whether you were asked this question and gave this answer, question starting at line 15:

"Q Did you consult any individual with respect to the facts and events discussed in the article?
"A It is long enough ago that I may be jumbling events in my mind. I remember calling to get copies of the testimony that Ford gave and asking for a copy of the testimony. I can't remember now whether I did that -- I don't remember it in preparing this article, but it is possible that I did. I do remember doing it. I think I did it in connection with the editorial that we were doing and after Harper & Row called Mitgang and he called us and started asking us questions and telling us that they were threatening us with a lawsuit. At that point I know that we wanted to get copies of the testimony that Ford gave to see exactly what was and what wasn't new in it. But I knew from my own general reading and knowledge and belief that what we had sounded like hot news and was worth publishing because if I, who followed these things rather closely, wasn't aware of it, it seemed that most of our readers would not be either and it was [495] important, and most general readers would not be aware of it."

Is that your testimony?

A Yes.

Q Isn't it a fact that you consider your readers to be people of influence and intelligence?

A Yes.

Q Wasn't one of your alleged reasons for copying as you did, that a normal book buyer would not be able to see the impropriety issue from Ford's account unless your article came out with it first?

MR. ABRAMS: I object to the form of the question. Using the word "copied" as you did, asks for the ultimate conclusion in the case.

MR. ZISSU: I am not asking for a legal conclusion. There is no doubt that was copying in the case. I will change the word "copying."